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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. 77-1655

CHARLES BEN HOWELL ..... *Petitioner*

v.

CARL THOMAS, SHERIFF,
DALLAS COUNTY, TEXAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

CARL THOMAS, SHERIFF,
DALLAS COUNTY, TEXAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, Charles Ben Howell, complains of the respondent, Carl Thomas, Sheriff, Dallas County, Texas and petitions for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgments and orders entered in that Court in its Cause No. 77-1633 where this petitioner was petitioner-appellant and this respondent was respondent-appellee.[1]

Opinions Below

Following is a listing of all formal opinions regarding this case in the federal and state courts together with dates,

[1]Unless otherwise indicated, all emphasis has been supplied by petitioner.

publication data and references to the petitioner's appendix where the same may be found.

United States Court of Appeals, Fifth Circuit, January 16, 1978, 566 F.2d 470 (P.A.19).[2] United States District Court, Northern District of Texas, Dallas Division, February 2, 1977 unpublished (P.A. 9).

Proper Appeal: United States Court of Appeals, Fifth Circuit, July 16, 1975, 516 F.2d 53. United States District Court, Northern District of Texas, Dallas Division, November 30, 1973, unpublished (A.313-315), opinion on rehearing, March 1, 1974, also unpublished (A.320).

State Courts: Court of Criminal Appeals of Texas, November 15, 1972, 488 S.W.2d 123.

Jurisdiction

The judgment of the Court of Appeals was entered on January 16, 1978 (P.A.21). The Court of Appeals extended the time to petition for rehearing until February 25, 1978. Inasmuch as that date fell upon a Saturday, the petition for rehearing, which was filed on Monday, February 27, 1978, was timely. The petition for rehearing was denied on March 17, 1978 (P.A.21) and this certiorari petition is being filed within ninety (90) days thereafter. The jurisdiction of the Supreme Court is invoked under 28 *U.S.C.*, §1254(1).

[2]In referring to the record of proceedings in the court below, petitioner will employ the following abbreviations: (P.A.) — Petitioner's Appendix attached to the rear of this petition; (A.) — Joint Appendix filed with the Clerk of the Fifth Circuit, (R.) — Record of Proceedings prepared by U.S. District Clerk, Northern District, Texas. It should be noted that many of the papers from the latter court are copies of court papers originally filed elsewhere.

Questions Presented

QUESTION ONE:

Does it comply with the constitutional concept of fundamental fairness to commit the accused to jail in satisfaction of a summary jury-denied contempt conviction after a related plenary trial wherein a jury has directly held the accused not guilty of the misconduct previously found against him?

QUESTION TWO:

Is the "different juries" argument only valid in one direction? If the first trier of fact finds the controlling issues in favor of the accused, it is established by the collateral estoppel rule that a contrary finding by a second trier of fact cannot stand. Where the converse situation occurs, is it sufficient to dismiss the incongruity as "the vagaries of jury trial" raising no constitutional question? Are not the incongruity and the vagaries the same in each instance? Is there a theoretically sound basis for the holding below that in criminal actions, the collateral estoppel argument has prospective effect only?

QUESTION THREE:

Is a contempt conviction, summarily imposed, constitutionally valid if the record fails to contain an affirmative showing that the original trier of fact found the defendant's conduct to constitute an obstruction of justice?

Constitutional Provisions, Statutes and Rules Involved

The United States Constitution, Amendment V, (P.A.31)

The United States Constitution, Amendment XIV, Section 1, (P.A.31)

Summary of Argument

(1) *Equity and Fairness Are the Only Limitations Upon Collateral Estoppel*: This would have been a clear case of collateral estoppel had the sequence of the trials been reversed. The federal District Court ruled the sequence to be controlling, but the ruling is in direct conflict with *U. S. v. Prince*, 430 F.2d 1324 (4-Va. 1970). The District Court ruled that the policy bases for double jeopardy and collateral estoppel are the same: the "harassment factor" of successive prosecutions. However, the defendants who were claiming estoppel had never been previously prosecuted at all in *Prince* or in *U. S. v. Bruno*, 333 F. Supp. 570 (E.D. Pa. 1971), or in *U. S. v. McArthur*, 419 F. Supp. 186 (D.C. N.D. 1976) affd. sub. nom. *U. S. v. Casper*, 541 F.2d 1274 (8-N.D. 1976). Nor had the defendants claiming estoppel been previously prosecuted *regarding the same transaction* in *Wingate v. Wainwright*, 464 F.2d 209 (5-Fl. 1972), or *Blackburn v. Cross*, 510 F.2d 1014 (5-Fl. 1975) (nor was further prosecution being foreclosed).

The core of the *DiGiangiemo* case, which the District Court failed to grasp, is that collateral estoppel has two distinct constitutional bases: (1) the Double Jeopardy Clause, and (2) 14th Amendment Fundamental Fairness; the second basis not being subject to arbitrary restriction by the conviction/acquittal sequence. The Fairness Doctrine is a recurring theme of all cases cited, from *Ashe v. Swenson* forward.

(2) *Collateral Estoppel Being Employed Defensively Prevents Revocation of the Stay*: The District Court's conclusion that collateral estoppel is being employed in the forbidden retrospective manner is incorrect. The sequence of these cases and the delay in moving to revoke the federal

stay were matters of prosecutorial strategy. Petitioner does not seek habeas as such, but only seeks to defend against the motion to revoke.

(3) *Due Process Principles of Fundamental Fairness Prohibit Punishment in This Case*: The Trial Court's statement that "different juries" will occasionally reach different results is inapplicable. The contempt proceedings denied an entire list of due process safeguards, including the right of jury trial. Additionally, the jury expressly acquitted petitioner of obstruction of justice, a constitutional requirement, while Judge Holland probably never considered the matter. These factors, plus Judge Holland's improprieties, render it fundamentally unfair to imprison after a jury at a related trial has acquitted of the identical misconduct allegations.

(4) & (5) *The Record Fails to Reflect That Judge Holland Convicted Petitioner of Obstruction of Justice — Alternatively, the Record on the Point Is Inadequate to Stand in Opposition to The Jury Verdicts*: By special verdict, the jury directly acquitted petitioner of obstruction; a constitutionally required element of criminal contempt. The record of the two cases, particularly Judge Holland's disbarment testimony, makes it exceedingly doubtful that Judge Holland ever passed on the obstruction issue. Each crucial element of the offense must be considered by the originally constituted trier of fact, *In re Winship*, 397 U.S. 358 (1970); *Kibbe v. Henderson*, 534 F.2d 493 (2-N.Y. 1976), and the failure of the record to so reflect voids the conviction. Alternatively, the jury verdict has been reconciled to the contempt conviction and as reconciled, it acts as a collateral estoppel precluding further imprisonment.

Statement of the Case

The Fifth Circuit previously denied habeas to petitioner on July 16, 1975. *Howell v. Jones,* 516 F.2d 53 (5-Tex., 1975). This Court denied certiorari on February 23, 1976, *Howell v. Jones,* No. 76-953, 424 U.S. 916 (1976). Subsequently, on February 2, 1977 the District Court overruled petitioner's opposition to the state's motion to revoke its stay order dated January 18, 1973 and petitioner again appealed. The present proceeding primarily concerns the effect of the July, 1976 disbarment trial wherein a jury verdict effectually acquitted petitioner of all charges upon which the contempt convictions, that are the subject of the habeas proceedings, are based.

Fact Statement Concerning Previous Appeal: For 21 years, Charles Ben Howell had enjoyed a good reputation as a practicing lawyer; never previously cited for contempt, subject to no disciplinary action of significance (A.82, 158).[3] In July, 1972, he was ordered to jail upon state court findings that over a year earlier, he "failed to make full disclosure as to all of the facts surrounding the matter before the Court after the Court had directly inquired" (P.A. 2-3) and that at the contempt hearing, he had refused to reveal the names of the attorneys consulted regarding his case (P.A. 1-2). State remedies exhausted (A. 217), he sought federal habeas.

The story begins May 26, 1971 when petitioner brought his divorce client before the Honorable Dee Brown Walker to obtain a default (A. 105-108). This default became a

[3]The present appeal was heard in the Fifth Circuit upon the joint appendix of the previous appeal, plus a supplemental joint appendix. For convenience, page numbering of the supplemental appendix was begun with page A. 1001.

highly contested issue. Judge Walker numerously urged petitioner to set it aside by agreement because the opposing attorney "might get sued for malpractice." Petitioner replied: The judge was asking disloyalty to the client; if the judgment was defective, the Court had ample power to set it aside; but if it was good, the client would be advised to stand on it (A. 61-62, 160-161). On December 13, 1971, Judge Walker entered summary judgment setting the default aside (A. 63). In preparing for appeal, petitioner discovered that the Judge had caused two court reporters to certify documents *after* they had been filed (possibly, after judgment had been rendered on uncertified papers). Under the Judge's instructions, one reporter backdated his certificate several months (A. 126-138, 79-81).

Petitioner's position is that Judge Walker was in a hurry and signed the judgment after making superficial inquiries and giving only the shortest amount of time for presentation of the case, all because "there will be a motion to set this aside" and because the opposing side "can file a motion" (A. 30). In other words, Judge Walker treated the entire hearing in an abrupt and offhand manner because he fully expected to set the matter aside at a later date. However, for reasons unknown, the husband and his attorney failed to file a proper motion within the 30 day period allowed by law. Petitioner says that when he refused to set the decree aside by agreement, Judge Walker became so upset that he altered the court's papers in order to establish a basis upon which he, Judge Walker, might set the default judgment aside. Thereafter, when petitioner called Judge Walker's hand on the matter of altering court papers, Judge Walker retaliated by declaring petitioner in contempt. In short, petitioner furnished Judge Walker all of the information that Judge Walker desired to receive at the

time of the default judgment. The claim that petitioner omitted to furnish information to Judge Walker is a claim which was fabricated much later and which was born out of spite.

Hearing occurred on July 27, 1972 before the Honorable Louis T. Holland (A. 143), now deceased. Petitioner attempted to contend that the charges were motivated by spite and were being prosecuted to injure his candidacy in the upcoming November election.[4] But Judge Holland refused to allow cross-examination on matters relating to credibility or bias and prejudice (A. 73-78) and entered against petitioner not one but two convictions.

The Texas Court of Criminal Appeals denied relief on November 15, 1972 (A. 202-207), and denied rehearing on January 10, 1973 (A. 215). Petitioner filed a jurisdictional statement with the Supreme Court, No. 72-1448, on April 24, 1973, which was dismissed "for want of a substantial federal question." *Howell v. Jones,* 414 U.S. 803 (1973). Anticipating that respondent would contend that the Supreme Court's summary disposition precludes habeas relief, petitioner filed with the Supreme Court a motion to rehear, set aside its previous dismissal order and allow voluntary dismissal under Supreme Court *Rule* 60(2), but the Supreme Court entered its order "Petition for rehearing and other relief denied," 414 U.S. 1052 (1973).

On January 16, 1973, petitioner filed for a writ of habeas corpus with the United States District Court. The writ was denied on November 30, 1973 and the denial was

[4]Petitioner was Republican candidate for another state court judgeship in an all Democratic courthouse. If the proceedings was politically oriented, it was successful. A number of Republicans carried Dallas County on November 7, 1972, but petitioner lost his race receiving 46.3% of the vote.

affirmed by the Court of Appeals on July 16, 1975. Certiorari was denied on February 23, 1976.

During the state court contempt hearing before the Honorable Louis T. Holland, petitioner accidentally learned that Judge Walker had addressed a personal letter to Judge Holland concerning the case (P.A. 22-23), providing a copy to the prosecutor, but no copy to the official files and none to petitioner (A. 260-261, 242, 268-269). Judge Walker refused petitioner's demand for the letter (A. 269), but the U. S. District Court granted discovery of the letter and of discussions between the judges (A. 234). Judge Holland testified to the federal court that he was unable to recall any specific discussions with Judge Walker and was uncertain if he received any letters from Judge Walker (A. 275-277), but Judge Walker's testimony was:

> "Q. Judge Holland knew * * * [it?] was coming? A. He knew * * * [it?] was coming. I told him I would get it to him the next day" (A. 251).

Judge Walker urged that "the determination of the Certificate of Contempt is the primary fact finding." He contended "probably the burden of going forward will rest on Charles Ben Howell to rebut the determination heretofore made." He stated that "federal cases" would "indicate his right to a confrontation involvement." He stated that in his opinion, Judge Holland need receive only "nominal testimony" and "consider what defense, if any, Mr. Howell has" prior to entering a conviction.

The letter concluded with self-laudatory assurances that petitioner had received "every indulgence a long suffering court can give" and that the "spirit" exercised by the writer was "in vain." No copy of the letter was given to petitioner or filed with the official court papers, although

a copy was provided to the prosecutor (A. 242, 268-269, 308). Judge Holland proceeded to privately advise Judge Walker that he was substantially in agreement with the complainants contentions (A. 279-280). On the date set, Judge Holland appeared and proceeded to trial without informing petitioner of his negotiations with the other side. They came to light only by accident (A. 164). It took federal discovery to obtain the letter or to even know of the discussions had (A. 2, 15, 234).

Regarding these communications, the Court of Appeals ruled: "There is no evidence that they had any effect on the trial judge's determination of the merits of the case." Apparently, the Court considered that it is the burden of an offended party in such instances not only to show that the judge engaged in ex parte communications with the other side, but it must also be affirmatively shown that the judge was, in fact, influenced thereby.

Fact Statement Concerning Present Appeal: The United States District Court signed an order admitting petitioner to bail on January 16, 1973 (R. 49)[5] and he filed his bail bond on January 17, 1973 (R. 50). On January 18, 1973, this Court issued its "Stay Order" providing:

> "A stay of execution is hereby granted upon the judgments of contempt entered against petitioner in the Domestic Relations Court No. Two of Dallas County, Texas * * *. Pending further orders of this Court, the respondent, Clarence Jones, Sheriff of Dallas County, Texas is hereby temporarily restrained and enjoined from incarcerating the said Charles Ben

[5]The present appeal was heard in the District Court upon the original record, plus a supplemental record. For convenience, page numbering of the supplemental record was begun with page R. 2001.

> Howell upon the aforesaid judgments * * * or any writs, executions, warrants and process pursuant thereto" (R. 52).

While the contempt proceedings were progressing through the courts, Judge Walker presented a complaint to the local bar grievance committee and a disbarment suit was filed against petitioner in a district court of Dallas County, Texas. The particular fact allegations of misconduct contained in the disbarment petition were lifted almost verbatim from the opinion of the Texas Court of Criminal Appeals in the contempt case. (A. 202-207) *Ex parte Howell*, 488 S.W.2d 123 (Tx. Cr. 1972):

> "Howell's testimony reflects that he did not tell Judge Walker about the hearing set for June 2, 1971 and refused to reveal the fact, even when directly questioned, that there was another case pending and that he and the attorney for Mr. Ralston had appeared before Judge Gibbs relative to both cases just two days previously. Acting upon these representations by Howell, Judge Walker entered a default judgment awarding custody of the minor children to Edna Ralston, Howell's client, even though Howell was aware that the very matter was set for hearing on June 2, 1971 in Domestic Relations Court No. 3. * * *"

> "On June [sic] 27, 1972, Howell appeared before Judge Holland, a retired judge sitting in Domestic Relations Court No. 3, to determine whether or not he was guilty of contempt of Judge Walker. During the hearing, Howell became a witness in furtherance of his Motion for Continuance and testified that he had attempted to hire four different lawyers who had refused to represent him due to alleged fear of retribution from

Judge Walker. The Assistant District Attorney, John Tolle, asked him to name the four lawyers he had contacted which he refused to do. The Court instructed Mr. Howell to answer the questions, Mr. Howell refused to do so and persisted in his refusal to answer the questions * * *" (R. 2560-2561).

During the week of July 12, 1976, the disbarment case was tried to a jury as required by *Art.* 320a-1 Tx. Cv. St. In accordance with special issue practice generally prevailing in Texas, the jury returned a special verdict, the presently material portions reading:

"*SPECIAL ISSUE NO.* 1: Do you find from a preponderance of the evidence that on or about the 26th day of May, 1971, at the time he obtained a default judgment in an action pending in Domestic Relations Court Number 2 involving divorce, property and custody of minor children, Charles Ben Howell did not tell Judge Walker that another action involving the same parties regarding divorce, property, and custody of minor children was pending in Domestic Relations Court Number 3? ANSWERED: NO."

"*SPECIAL ISSUE NO.* 5: Do you find from a preponderance of the evidence that on or about the 26th day of May, 1971, at the time he obtained a default judgment in an action pending in Domestic Relations Court 2 involving custody of minor children, Charles Ben Howell did not tell Judge Walker that a hearing involving the custody of minor children had been set by Judge Gibbs for June 2nd, 1971? ANSWERED: NO."

"*SPECIAL ISSUE NO.* 9: Do you find from a preponderance of the evidence that Charles Ben Howell failed to answer a question relating to his motion for continuance when he was instructed by Judge Holland to answer? ANSWERED: YES."

"*SPECIAL ISSUE NO.* 10: Do you find from a preponderance of the evidence that when Charles Ben Howell failed to answer a question relating to his motion for continuance which he was instructed by Judge Holland to answer, if you have so found, that he engaged in conduct that was prejudicial to the administration of justice? ANSWERED: NO" (P.A. 3-8).

The jury verdict was accepted and filed (R. 2591). Shortly thereafter, the State filed a motion for judgment n.o.v. The Court upheld the verdict insofar as it pertained to the May 26, 1971 divorce hearing. However, the Court overruled Special Issue No. 10 and issued judgment that "* * * based upon the evidence and the jury's answer to Special Issue No. 9, * * * the Defendant is guilty * * * [of engaging] in conduct that was prejudicial to the administration of justice". Petitioner's punishment was fixed at an official reprimand (P.A. 7-8).

Petitioner Howell appealed the adverse portion of the disbarment judgment (R. 2595). The State intermediate court has affirmed, *Howell v. State*, 559 S.W.2d 432 (Tx.Cv. Ap. 1977). An application for writ of error was timely filed with the Texas Supreme Court, *Howell v. State*, 21 Tex. S.Ct. J. 186 (No. B-7,360, docketed February 7, 1978).

Judge Holland sent petitioner to jail immediately after the close of the hearing on July 27, 1972 (A. 103). On July 31, 1972 the Texas Court of Criminal Appeals ordered the respondent, Dallas County Sheriff, to enlarge the petitioner upon the giving of a bail bond (A. 157). After January 18, 1973, petitioner remained at large pursuant to the stay order of the District Court below. The Fifth Circuit man-

date was filed with the District Clerk on March 5, 1976 (R. 2000D). However, the State authorities took no action whatever to subject petitioner to the contempt judgments. Petitioner remained at large during the pendency of the disbarment suit and thereafter. During none of this time did the respondent sheriff have in his office or in his hands any order, writ or process of any kind calling for the rearrest of petitioner or the execution of the Dallas County judgments (R. 2059).

Finally, on November 11, 1976, the Assistant District Attorney of Dallas County, Texas filed a motion with the U. S. District Court asking "that the orders admitting petitioner to bail and staying the execution of process from the Courts of the State of Texas be in all things set aside and held for naught" (R. 2001).

On the following day, November 12, immediately after being served with a copy of the State's motion, petitioner filed a response to the State's motion (R. 2003) and on November 16, petitioner filed his "Amendment to Petition for Habeas Corpus" (R. 2008) in which pleadings petitioner asserted the defenses urged in this brief.

The District Court denied relief on February 2, 1977 (R. 2085), overruled a petition for rehearing on February 16, 1977 (R. 2102) and issued certificate of probable cause on March 15, 1977 (R. 2103).

Fifth Circuit Ruling Concerning Present Appeal: The Court of Appeals summarily affirmed the present proceedings on January 17, 1978 (P.A. 19). The opinion is five paragraphs in length, but the majority thereof is a recitation of background facts. The Court's ruling upon the questions herein was compressed entirely into two sentences:

"No cases have been found which support the novel contention that the outcome of a second proceeding can collaterally estop the effect of an already concluded prior proceeding."

"None of these contentions are sufficient to justify relief in the federal court." (P.A. 19).

The opinion contains no citation of authority whatever.

Reasons For Allowing The Writ

ONE

EQUITY AND FAIRNESS ARE THE ONLY LIMITATIONS UPON COLLATERAL ESTOPPEL.

It is well established that contempt convictions are criminal convictions and that the law of contempt is the criminal law. *Bloom v. Illinois,* 391 U.S. 194 (1968). In support of his collateral estoppel claim, petitioner relies primarily on two cases decided "back to back" by the Supreme Court on April 6, 1970, *Waller v. Fl.,* 396 U.S. 389 (1970) and *Ashe v. Swenson,* 397 U.S. 437 (1970). In *Waller,* it was held that all officers and entities of the state ultimately derive their power from the same organic law and that proceedings had by one state entity are binding upon the others. In *Ashe,* it was held that collateral estoppel is a component of the double jeopardy clause and binding upon the states. The District Court stated that petitioner was "probably correct" in his contention that the parties and issues were sufficiently related * * * to trigger collateral estoppel" (P.A. 11).

Historically, collateral estoppel is a product of the courts of equity and most importantly to the case in hand,

it is based upon equitable principles. Its application to the criminal law is of recent vintage.

In *Ashe,* six poker players were robbed in a single transaction. Held: Where the State failed to prove the identity of the defendant at the trial for robbery of one poker player, collateral estoppel prevented prosecution for robbery of the other players.

> " 'Collateral estoppel' * * * means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties * * *. As Mr. Justice Holmes put the matter * * * 'It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.' * * * It is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case * * * because of lack of "mutuality" * * *.'
>
> "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be *applied* with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. * * * The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings," *Id.* 443-445.

While the Supreme Court held the collateral estoppel doctrine to be rooted in the Double Jeopardy Clause, it is obvious that collateral estoppel goes far beyond ordinary notions of double jeopardy, i.e., successive prosecutions for the same offense. It is a classic principle of the criminal law in general that where a crime is simultaneously practiced upon several individuals, separate crimes are committed

and they may be separately prosecuted. The majority opinion expressly refused to upset this principle. It is not the prosecution but the *acquittal* (emphasis: the acquittal) which gives rise to collateral estoppel. Due Process is offended when further proceedings are had against an accused who has obtained a finding in his favor upon an issue which is determinative of his guilt or innocence. Employing 17th century terminology, this "stoppeth" the prosecution from further contending that the accused is guilty of the charges against him.

In *Harris v. Wa.,* 404 U.S. 55 (1971) (Bomb in the mail exploded injuring several persons), it was held that an acquittal bars further prosecution even where the judge at the first trial erroneously excluded key evidence for the prosecution. The verdict in favor of petitioner was returned in a disbarment case, classified by Texas Courts as a civil proceedings, *Drake v. State,* 488 S.W.2d 534 (Tx.Cv.Ap. 1972). However, no distinctions can be laid on this grounds. In *One Lot Emeralds v. U. S.,* 409 U.S. 232 (1972), it was held that acquittal in a criminal proceedings does not bar a civil forfeiture action because the criminal action places a greater and additional burden of proof upon the prosecution. However, the case in bar is one where the State was unable to secure a verdict upon a mere preponderance of the evidence. The logic of *Emeralds* clearly indicates that a defendant's verdict in a civil forfeiture action will stand as a collateral estoppel against criminal proceedings. See also *Coffey v. U. S.,* 116 U.S. 436 (1886); *U. S. v. U. S. Coin,* 401 U.S. 715 (1971); *One* 1958 *Plymouth v. Pa.,* 380 U.S. 693 (1965), and *In re Ruffalo,* 390 U.S. 544 (1968).

The case in hand is novel in that the verdict in favor of the accused came after, rather than before, the judgment of

conviction which respondent seeks to enforce but *Simpson v. Fl.*, 403 U.S. 384 (1971) (Conviction followed by reversal followed by acquittal followed by collateral prosecution) indicates that no hard and fast rule can be drawn from the mere sequence of judgments.[6]

> "In Ashe itself, we specifically noted that 'mutuality' was not an ingredient of the collateral estoppel rule * * *. Had the second trial never occurred, the prosecutor could not, * * * have laid the first jury verdict before the trial judge and demanded an instruction to the jury that, as a matter of law, petitioner was one of the armed robbers in the store that night. It must, therefore, be equally clear that * * * the constitutional guarantee against being twice put in jeopardy for the same offense vitiates petitioner's conviction."

The Fifth Circuit was in the forefront in applying collateral estoppel in criminal cases, *Yawn v. U. S.*, 244 F.2d 235 (5-Fl. 1957).[7] Following *Ashe v. Swenson*, it was held that "evidentiary" collateral estoppel was binding upon the states. *Wingate v. Wainwright*, 464 F.2d 209 (5-Fl. 1972). Held, the defendant's other victims cannot give " 'course of action' " testimony when their own prosecutions have resulted in acquittals. The point again to be made is that collateral estoppel extends far beyond ordinary notions of

[6]See also **Turner v. Ar.**, 407 U.S. 366 (1974), rejecting an attempt to embroider a "law of the case" restriction upon the collateral estoppel rule.

[7]Held, after the defendant had been acquitted of the substantive offense of possession of an illegal still, the government is estopped to offer evidence of the possession of the same still in support of an indictment for conspiracy to violate the liquor laws. The Court acknowledged the rule that conspiracy and the substantive offense are separate crimes which may be tried separately. Nevertheless, the acquittal estopped the government from attacking the issues already decided in favor of the defendant.

double jeopardy. It was correctly argued that the State was not being precluded from prosecuting the defendant upon the particular indictment at all; it was only being precluded from offering evidence that had been rejected in another case. The question was not one of "running the gauntlet" twice, the question was one of fundamental fairness. Remember that collateral estoppel was forged in the courts of equity and follows equitable principles.

> "It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded that he did not commit. * * * Wingate was charged with robbing Hellman and Angel and as a result of those charges, he endured the perils of trial. He was acquitted of those charges and that should end the matter" *Id.* 215.

"The doctrine of collateral estoppel * * * is bound up in the whole complex of values that the guarantee against double jeopardy represents * * *.

"The State with all its resources should not be allowed to make repeated attempts to convict an individual * * *, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty * * *." *Blackburn v. Cross*, 510 F. 2d 1014, 1018-1019 (5-Fl. 1975).

"This Court usually finds that its supply of ingenious

semantic puzzles and fantastic hypotheticals emanate from the supplications of defendants. * * * But fantastic hypotheticals introduced by the State to avoid the defense of double jeopardy are subject to a different standard. We must see if a 'rational jury' could have based its decision upon such factor * * *.

"* * * Double jeopardy is not a semanticist's paradise, but is to be determined by applying conventional idioms to the jurors' deliberations. The exorcised double jeopardy is the constitutional eliminator of the might have beens. Puristic parallelism is not an absolute in the law of double jeopardy * * *." *Johnson v. Estelle*, 506 F.2d 347 (5-Tx. 1975).

There is little room to deny that, if the jury verdict in the quasi-criminal action of disbarment, *In re Ruffalo*, supra, had been returned prior to the contempt trial, the contempt convictions would have been barred by collateral estoppel. However, the District Court held the conviction/acquittal sequence to be crucial and the Fifth Circuit has agreed. The Supreme Court did not so indicate in *Simpson v. Fl.*, supra. While none of the cases just discussed is squarely in point, they all emphasize that the entire basis of the collateral estoppel doctrine is fairness, equity and good conscience. Why the arbitrary limitation of "prospectivity?" Is it logical to declare that the accepted notions of fairness, equity and good conscience *ARE*, in fact, offended by a conviction which follows an acquittal while those notions *ARE NOT* offended when the conviction comes first and the acquittal second. We think not.

The District Court declared that petitioner was attempting to stand collateral estoppel upon its head and "to turn the constitutional shield of nonmutuality into a sword."

The Court pictured the State as being forced to "wager" convictions which had previously been "won" in order to further prosecute. The Court raised the specter of the prosecution "losing" five supposedly "final" convictions which it had duly and fairly "won" if the sixth trial resulted in an acquittal. We ask:

(1) Has the District Court itself not lapsed into "ingenious semantics" or "fantastic hypotheticals?" A single criminal episode resulting in offenses against several persons is not at all uncommon. But, how many instances can the Court recall or find in the books where multiple separate prosecutions resulted from a single criminal episode? If the prosecutor was dissatisfied with the punishment imposed for robbery of the first poker player, he might prosecute a second time, but six times — never!![8]

(2) The teaching of Messrs. Gilbert and Sullivan is that the punishment should fit the crime. Six successive prosecutions for the robbery of a single poker game occurs to us as a mite bit of over-kill. Perhaps, the hypothetical prosecutor deserves to "lose" his "winnings" as a check upon his tendency to vindictiveness.

(3) Even closer at hand, bear in mind that imprisonment is the objective of prosecution. *Ashe* directly holds that the state's right to imprison for the remaining five

[8]The Court of Appeals has branded petitioner's case as "novel". We agree, but we deny the inferred conclusion that novelty alone is a sufficient basis for the denial of an appeal. In practice, successive prosecutions rarely occur if the first prosecution succeeds. See **U. S. v. McKim**, 509 F.2d 769 (5-Tx. 1975), where the prosecution admitted that the second prosecution was brought because the first one failed. In the present case, petitioner believes that the disbarment prosecution would never have been commenced or brought to trial except for "untoward pressure" continuously exerted from behind the scenes by the Honorable Dee Brown Walker. See the Grievance Committee correspondence atttached hereto (P.A. 24-25).

poker robberies becomes void if the first trial results in an acquittal. What is the practical difference between voiding the right to imprison for offenses numbered 2 through 6 if No. 1 fails and voiding the right to imprison for offenses numbered 1 through 5 if number 6 fails? Viewed either from a prosecution or a defense standpoint, the result is identical. Any distinction appears to lay more in the area of semantics or emotional appeal (requiring the prosecution to give up what it has already "won" as if a criminal conviction were a trophy or a sum of money damages) than in the world of reality.

(4) As pointed out above, the notions of fairness, equity and good conscience are no more offended by the one aspect of the conviction/acquittal sequence than by the other.

(5) As we see it, the real core of the unfairness proposition is the irrevocable fact that one of the triers of fact has made a mistake. The poker game robber was surely misidentified either at the first trial or the second. The conviction/acquittal sequence cannot decide which trier of fact was correct and which one was incorrect. Wherever it falls in the sequence, the acquittal casts the same doubt over the related conviction or convictions.

(6) Bear in mind that the prosecutor is forever the moving party. The defendant need not to be tried of robbery of any of the six poker players, if the prosecutor deems the evidence insufficient. Prosecutors are forever inclined to present their strongest case foremost. Having secured a conviction for the robbery of one poker player, why does a prosecutor press forward expending the money of the taxpayers and the time of the courts to secure second, third, fourth, fifth and sixth successive convictions all growing out

of the same single criminal episode? The only answer which we can conceive is that the prosecutor felt that the first conviction did not yield sufficient punishment. But, the quantum of punishment is forever tied to the strength of the evidence. Whether punishment be fixed by judge or jury, there is a perpetual tendency to ameliorate the punishment where the evidence is not as conclusive as might be desired. Doubtful cases should not be prosecuted ad infinitum. It occurs to us that the best method to discourage overprosecution might be to force the prosecution to "wager" convictions that have already been "won".

There is an easy answer to the problem from the prosecution's standpoint. It was argued by Mr. Justice Brennan in *Ashe* and has been numerously espoused by other members of the Supreme Court, albeit a minority view. Why should the prosecution be allowed to hold back ammunition? Does it not better serve the purposes of the Court, of judicial administration and the interest of justice to try all offenses arising out of the same criminal episode in a single case? There will be instances when this is not feasible, but those instances should constitute the exception, rather than the rule. With regard to those exceptions, is it not reasonable to require prosecutors to "wager" the scalps which they have "won" in order to discourage prosecutors from seeking to split what should be a single cause of action into many. The rule against splitting causes of action is well-established in the civil law and its penal effect is considered necessary in order to give the rule any muscle or impact. To the extent discussed, petitioner suggests that the rule against splitting has a definite place in the criminal law.

U. S. v. Prince, 430 F.2d 1324 (4-Va. 1970), is directly contrary to the ruling below. Prince was convicted of aiding and abetting a violation of the hunting laws. While his case was on appeal, his companion was separately tried and acquitted. Held, the government by bringing the defendants to trial separately had indeed "wagered" in the second trial the conviction which it had "won" in the first trial. Without even mentioning the term, the Fourth Circuit clearly and necessarily rejected the holding below — "collateral estoppel is prospective only —."

The District Court below stated: "The policy behind the two doctrines [collateral estoppel and double jeopardy] is the same: to prevent the state from going forward on a previously resolved issue." We agree that the policies are similar, but cannot agree that they are identical.

Double jeopardy is a doctrine of the common law, wooden and mechanical in its operation. It can result where *no issues at all* have been decided, as from an improper mistrial. It is wholly unconcerned with the outcome of the case. It flows as easily from successive convictions as from a conviction/acquittal sequence. A defendant convicted in the City Court and given thirty days might plead jeopardy and defeat a thirty year sentence imposed in the District Court. The only test is whether or not the defendant is being tried for the identical offense.

Collateral estoppel is much broader in its potential sweep, but far less frequent in its actual occurrence because, in the words of the District Court below, "collateral estoppel is triggered only by acquittal."

One might judge from reading the District Judge's opinion below that the sole policy basis for collateral estoppel is the harassment factor necessarily arising from successive prosecutions. While such may be the sole basis of the jeopardy rule, analysis of the cases shows that collateral estoppel has a broader basis; the due process requirement that all criminal proceedings fully comply with the Anglo-American concept of a fundamentally fair trial.

The proposition was thoroughly explicated in *U. S. ex rel. DiGiangiemo v. Regan*, supra, 1264-1266. While the decision was cast aside by the Court below, petitioner believes it to be an exceptional analysis of collateral estoppel as applied in criminal cases, loc.cit.1264-1266. That habeas petitioner had been indicted in two related state cases. In the first case, the state court granted a motion to suppress and dismissed the indictment. In the second case, no motion to suppress was made, but a habeas attack was subsequently based on a claim that the suppression order in the first case constituted a collateral estoppel. The Second Circuit expressed agreement with the collateral estoppel principles argued even though it held the claim to be untimely. Judge Friendly recognized that, strictly speaking, the petitioner had never been placed in jeopardy in the first prosecution. He stated that *Ashe v. Swenson* "does not rule this case." However, he went on to cite the ALI-civil practice definition of collateral estoppel and held primarily on strength of *U. S. v. Oppenheimer*, 242 U.S. 85 (1916) and *Hoag v. N.J.*, 356 U.S. 464 (1958), that due process "unaided by the double jeopardy clause, requires a state to apply collateral estoppel in favor of a criminal defendant." Mr. Justice Holmes' statement that the safeguards of the person should equal those which "protect from a liability in debt" was held to be a due process principle.

The Court intimated that due process requires a greater extension of collateral estoppel in criminal than in civil cases. We submit that no matter how widely the doctrine be applied, it poses little obstacle to the conviction of those who are clearly and plainly guilty because it never comes into play unless *at least one trier of fact* is of the opinion that the accused should be acquitted. Whether the doctrine be applied prospectively, retrospectively, or however, the notion that it will ever turn droves of the blood-guilty back onto the streets is palpably unsupportable.[9]

Returning to *U. S. v. Prince,* supra, if the District Court be correct that "harassment" is the *only* policy basis for collateral estoppel, then there is no basis for the decision of the *U. S. v. Prince,* supra. We think *Prince,* like *DiGiangiemo,* to be grounded upon fundamental fairness. It offends fundamental notions of fairness to allow the main actor to go free and to imprison someone who merely assisted him.

Likewise, in *U. S. v. Bruno,* supra, a severance was granted to one defendant and the remaining two defendants were acquitted on certain counts. Held, collateral estoppel prohibits trial of the severed defendant upon those counts. Again, the decision is in conflict with the ruling below that collateral estoppel is grounded solely upon the harassment factor of repetitive prosecutions.

[9]Successive prosecutions are indeed a tremendous drain upon the accused. They drain away the time that he might spend pursuing his occupation, supporting his family, and partaking the pleasures of life. They drain him physically, emotionally, and, of course, economically. However, the drain on the accused is identical whether he is successively convicted of robbing five poker players and then acquitted at the sixth trial or vice versa. We would also point out that an acquittal at the sixth trial would be unlikely to turn the man "scot-free", for the time spent in prison between the arrest and the sixth trial would be, beyond doubt, extensive.

Likewise, in *U. S. v. McArthur,* supra, two Wounded Knee defendants urged collateral estoppel of an issue which had been decided in favor of certain co-defendants separately prosecuted. The Court indicated that a collateral estoppel claim would lie even though the harassment factor was completely absent and the Eighth Circuit stated: "We concur." *U. S. v. Casper,* supra.[10]

The foundation stone for the entire system of constitutional restraints upon the trial of criminal cases is the protection of the innocent. The presumption of innocence and proof beyond a reasonable doubt have been described as the bedrock principles of a constitutionally acceptable criminal trial. When *Ashe* was acquitted of the robbery of one poker player and later prosecuted for the robbery of another, the previous acquittal cast the pall of reasonable doubt over the second proceedings. One jury has been correct in its conclusion and the other jury incorrect. Lacking the means to determine which jury was correct and which jury was incorrect, the Constitution required that the defendant go free upon both indictments because the benefit of the doubt must always go to the accused.

Would it have added or detracted one iota from the situation if the conviction/acquittal sequence had been reversed? We see no basis in logic upon which to lay a distinction. In *Ashe,* it appeared that the prosecution was better prepared and presented a stronger case the second time around. However, the Supreme Court expressly held that this makes no difference. See also, *Harris v. Wa.,* supra. The case of *U. S. v. Prince* is on all fours. In the first case, the jury concluded that the men involved were in fact

[10]However, both the District Court and the Court of Appeals were in agreement that collateral estoppel does not apply to questions of law, a proposition not in issue in the case at bar.

hunting the protected species of birds while in the second case, the jury concluded that the men were not; or more precisely, the jury concluded that the evidence was insufficient to prove guilt beyond a reasonable doubt. Lacking a reasonable means to declare one jury verdict correct and the other jury verdict incorrect, both prosecutions must fail. The same result must occur here.

The Fifth Circuit has stated:

> "No cases have been found which support the * * * contention that the outcome of a second proceeding can collaterally estop the effect of * * * [a] prior proceeding" (P.A. 20).

Apparently, the Court has overlooked the case of *U. S. v. Prince*, 430 F.2d 1324 (4-Va. 1970), a case which petitioner urges as being a virtual white horse.

The only distinction we find between *Prince* and the present case is that, in *Prince*, different defendants were involved in the different cases. However, the separate identity of the parties defendant would not serve to distinguish the cases. Disparity of the parties and the issues is grounds to *deny* the application of estoppel, not grounds to *grant* the estoppel. The present case involving the identical defendant, is stronger than *Prince*. Certainly *Prince* cannot be dismissed out of hand with the declaration that no cases have been found which would support petitioner's position.

The Fifth Circuit also rejected petitioner's claim on the grounds that it was "novel". We thought that the days of common law pleading were past and that the maxim "if there is no writ, there is no right," is dead. It is to be emphasized that collateral estoppel never comes into play unless the defendant is acquitted. Because of this factor,

the incidence of collateral estoppel is, in actual practice, comparatively rare. In certain instances, a speaker will brand a proposition as novel in order to convey the impression that the proposition is patently untenable. However, simple logic dictates that the conclusion does not necessarily follow the premise. Petitioner suggests that if the case is so "novel" that *no authority* either for or against the proposition can be found, the question deserves serious study so that the proper rule may be established.

TWO

COLLATERAL ESTOPPEL BEING EMPLOYED DEFENSIVELY PREVENTS REVOCATION OF THE STAY

The Fifth Circuit has further indicated that, in its opinion, collateral estoppel can have no application because, in the opinion of the Court, the contempt proceedings was "an already concluded prior proceeding." The conclusion is not supportable because the premise is unsound. The Court has completely overlooked the principle that there is no res judicata in a criminal proceeding and the validity of a conviction may be called into question at any time so long as the defendant labors under the onus thereof. *Fay v. Noia*, 372 U.S. 391 (1963); *Hensley v. Mun. Ct.*, 411 U.S. 345 (1973); *Hardwick v. Doolittle*, 558 F.2d 292 (5-Ga. 1977).

As a matter of fact, all habeas proceedings are defined as collateral attacks upon "an already concluded prior proceeding." Federal habeas is unavailable until the petitioner has exhausted all available means to obtain direct relief. We are unable to understand the Court's fixation with the notion that the contempt proceedings were "already concluded."

It appears that the District Court took a similar view of petitioner's claim. While the lower court discussed its "prospective only" ruling at some length (but cited no cases), it simply jumped to the conclusion that petitioner was, in fact, asserting collateral estoppel with forbidden retrospectivity. The term "prospective" must be given a locus. "Prospective" from what? From the standpoint of Adam and Eve, everything is prospective. Petitioner urges that collateral estoppel is being asserted as a defense to the State's motion to revoke the stay order of January 18, 1973. In this posture, the words "prospective" and "retrospective" have little significance.

The Court's example of five successive convictions for robbing different poker players is incomplete. To make the example complete, it must further be assumed that, after the first conviction had run its course in the State court, the defendant applied to the federal court for habeas, that the federal court determined that serious questions had been presented, issued a stay order and admitted the defendant to bail. It must further be assumed that each of the next four successive convictions was handled in an identical manner until five federal stay orders were in effect. It must additionally be assumed that the five habeas petitions were unsuccessful, but the state took no steps to dissolve the stay orders and imprison the defendant.

Assume now that the sixth successive trial produces an acquittal and only thereafter does the state attempt to revoke the five stay orders. Must or may the federal court consider the situation at the time of the motion to revoke or must it blindly and mechanically rule "prospective only" and dissolve the stays irrespective of the then existing circumstances?

Of course, the hypothetical is far-fetcher. However, the District Court's hypothetical, which itself has been stretched a bit, simply does not contain all of the elements presented by the instant case.

For a more common sense example, take the case of *U. S. v. McKim,* supra. Assume a conviction for marijuana importation followed by an appeal. While the appeal is pending, the defendant is convicted for jailbreak, but he does not appeal. Then, the marijuana conviction is reversed, the Court holding the imprisonment to be unlawful. Quare: Would the "prospective only" rule bar the defendant from habeas or §2255 relief from the jailbreak conviction? The purpose of the example is to illustrate that a monolithic "prospective only" approach to collateral estoppel is artificial, unworkable, and unjust.

Simple analysis of the situation in hand indicates that, ever since January 16, 1973, the State was on notice that it could not execute these contempt judgments and could not imprison the petitioner without the imprimature of the federal court. At any stage of the proceedings, the State might have asked the federal court to lift its stay. The federal court likely would have declined prior to July 16, 1975, when the Fifth Circuit affirmed. The federal court would have been within the bounds of discretion to continue to decline prior to February 23, 1976, when certiorari was denied.

Between February 23, 1976 and July 16, 1976, the U. S. District Court had no basis to refuse to dissolve its stay, and any refusal would have been immediately corrected by mandamus. However, during this lapse of almost five months, the State took no action whatever. In fact, the State took no action whatever to secure dissolution of the

stay order for several months thereafter, precisely until November 12, 1976.[11]

When the State finally came forward with a motion to revoke, petitioner immediately pleaded that circumstances had changed; that the intervening jury verdict declared petitioner not guilty of the findings made against him in the contempt judgment and that the same constituted a collateral estoppel.

The District Court speaks of the State being required to "wager * * * final convictions," but it is a basic principle that the Great Writ is always available to inquire into the lawfulness of imprisonment and that no criminal judgment ever becomes "final" in the sense that a civil judgment for money or property becomes final. New developments, new decisions, new evidence, sometimes coming years after a supposedly "final conviction" can entitle a prisoner to a new trial, a reduction of sentence or a discharge from confinement. *Ashe v. Swenson* reflects that the disputed second conviction had become "final" and that the defendant had spent ten years in prison before the Supreme Court ordered his release. What better authority can be cited for the proposition that collateral estoppel has nothing to do with the "finality" of convictions?

Petitioner's present premise is simply this: The federal District Court not only had the right, but the obligation to consider all circumstances which were then in existence at the time he was asked to revoke his stay order. The Court

[11]During this period, petitioner was a candidate for Judge Walker's bench. We surmise that Judge Walker was concerned with the political implications of putting one's opponent in jail. See **Cameron v. Brock,** 473 F.2d 608 (6-Tn. 1973). We note that Judge Walker announced as soon as the votes were counted that an effort to place petitioner in jail would commence immediately (P.A. 28).

had the further duty to refuse to revoke if new and intervening matters made it unjust or inequitable to impose further imprisonment against this petitioner. Colorful rhetoric declaring that collateral estoppel is being stood upon its head and converted from a shield into a sword wholly ignores the identity of the moving party. Petitioner was not asking affirmative relief. He was only seeking preservation of the status quo. On November 12, 1976, when the motion to revoke was filed, the State of Texas was the moving party. It was under the burden to explain the delay in moving to revoke the stay. It was under the further burden to show that it was not inequitable to revoke the stay even though an intervening jury verdict had completely exonerated petitioner of the matters found against him in the contempt judgments.

The District Court wholly failed to impose either burden upon the State. It was error to hold that the respondent is still entitled to revocation of the stay order *as a matter of right* even after the occurrence of these intervening circumstances.

Petitioner has no cases regarding the revocation of stay orders in habeas cases, but he has found two cases concerning the revocation of parole and probation. *People v. Grayson,* 319 N.E.2d 92 (Il. Sm. 1974); *Barrows v. Hogan,* 379 F. Supp. 314 (N.D. Pa. 1974).

Specifically concerning the revocation of parole or probation, other cases have held to the opposite. *Standlee v. Rhay,* 557 F.2d 1303 (9-Wa. 1977). Those courts which hold that the defendant is not entitled to reinstatement of his parole, if parole first be revoked and the defendant later acquitted by a jury of the offense causing the revocation, reach their conclusion upon the premise that the burden of

proof in the two proceedings is not the same. However, such logic has no application to the case in bar. In order to convict this petitioner of contempt, the State had the burden of proving guilt beyond a reasonable doubt. In the later disbarment proceedings, the State failed to prove guilt by a preponderance of the evidence.

We again emphasize that in criminal cases, and quasi-criminal cases as well, the defendant has little or no control over the sequence of the proceedings. It is entirely within the province of the prosecutor to determine how many indictments he shall ask, when he shall ask them, and the terms thereof. The State also decides when and if it will seek to cancel a professional license depriving the holder of his livelihood and when and if it will seek revocation of parole, revocation or probation or revocation of bail.

In the present case, why was the contempt tried immediately and the disbarment only brought to trial much later? The Honorable Dee Brown Walker announced on February 21, 1972 that he was going to "certify his [petitioner's] conduct to the Grievance Committee" (R. 2081; see also P.A. 24). However, the disbarment was not even filed until the contempt conviction had been upheld on direct review. It was not brought to trial until collateral review had been concluded.

Why did the proceedings follow this sequence? We suggest that the party instituting all of these proceedings considered that the prospects of securing a conviction in the no-jury permitted contempt action were greater than in the jury-required disbarment proceedings. If this be true, the sequence of the proceedings was a matter of prosecutorial strategy. It is another instance of the prosecutor trying his "best" case first. We do not think that due

process should be left exposed to the whims of prosecutorial strategy. It follows that little or no weight can be given to the conviction/acquittal sequence.

Likewise, it occurs to petitioner that the delay in seeking revocation of the federal court stay order was a matter of prosecutorial strategy. These extended proceedings wherein the Honorable Dee Brown Walker exercised unceasing efforts to obtain recourse against petitioner Howell had attracted a large amount of publicity in Dallas County (P.A. 26-27). It is suggested that the prosecution considered that placing petitioner Howell in jail would cause even more publicity, that it would create sympathy for petitioner, that the fact that petitioner had already been fined and jailed upon the charges being tried would inevitably filter into the jury box, and that the jury would be disinclined to convict twice for the same offense.

In short, it was prosecutorial strategy which determined the sequence of these entire proceedings, the contempt coming before the disbarment. It was also prosecutorial strategy not to move to revoke the federal stay order until after the disbarment trial had occurred.

Petitioner believes that the trial Court was entirely correct in holding that collateral estoppel "prevent[s] the State *from going forward* on a previously resolved issue [favorable to the accused]." That, we urgently submit, *is exactly what the State of Texas proposes to do* in the instant case. The District Court should have viewed the situation as it existed at the time it was requested to act. When a dissolution of the stay order was requested, an intervening jury verdict had declared the petitioner not guilty of the charges upon which the contempt convictions

were based. Collateral estoppel prevents revocation of the stay.

THREE

DUE PROCESS PRINCIPLES OF FUNDAMENTAL FAIRNESS PROHIBIT PUNISHMENT IN THIS CASE

The Fifth Circuit disposed of petitioner's fundamental fairness argument along with other claims by stating: "None of these contentions are sufficient to justify relief in a federal court." Surely, the Court did not intend to rule that fairness is not a matter of federal concern. Surely, the Court is familiar with such benchmarks for the federal review of state convictions as *Snyder v. Ma.*, 291 U.S. 97 (1934); *Solesbee v. Balkom*, 339 U.S. 9, 16 (1950) (Dsnt) and *Rochin v. Ca.*, 342 U.S. 165, 173 (1952).

Surely the Court meant only to invoke the maxim that not every irregularity in a state court proceedings is of sufficient gravity to warrant federal court relief. The Constitution guarantees a fair trial, not an error free trial. The matter ultimately resolves to the question of how fine the sieve shall be set. Petitioner urges that where, as here, a subsequent jury verdict is contrary to a previous jury denied verdict, the screen must be finely set.

The District Court overruled the present fundamental fairness proposition with the comment that its own notions of rectitude had not been offended. It is clear that such conclusion was based in large measure upon its erroneous ruling that "collateral estoppel is prospective only." Almost certainly, it was further influenced by the erroneous ruling that "the policy behind the two doctrines is the same," by its ruling that the *sole* basis for collateral estoppel is "the harassment factor," and its conclusion that there

is no harassment in successive prosecutions unless they are preceded by an acquittal.

The Court also stated that it is inherent to the criminal justice system that "different juries" will occasionally yield different results upon the same issues. Obviously, the Court failed to consider that in the contempt trial, the right of jury trial was denied along with the denial of several other rights generally considered as due process requirements of criminal justice such as notice in writing in advance of trial of the particular charges, adequate time for preparation, the right to be represented by counsel of one's own choosing (which includes the time needed to retain counsel), the right not to be tried by one's own accuser, the right of confrontation (to hear direct testimony under oath from all opposing witnesses), the right of cross-examination (to question opposing witnesses, also under oath), the right to call witnesses on one's own behalf (which includes the time needed to do so), the right to argue the facts to the trier of fact (including the time to secure counsel and to prepare), the right to argue the law to the trier of law *before* a decision is rendered (again including the time to secure counsel and prepare), the right to bail pending a final decision and appellate review (see A. 103) and the plenary right of appeal.

It is also to be noted that the District Court rejected *DiGiangiemo* where it was held that collateral estoppel is not only anchored upon the successive prosecutions restriction of the double jeopardy clause, but that it is also anchored upon general due process principles of fundamental fairness. Failing to recognize the special factors of this case, it was inevitable that the District Court found nothing offending the Court's own standards of fairness.

Petitioner would draw the Court's attention to the recent case of *State v. Gonzales,* 380 A.2d 1128 (N.J. Sm. 1977). This decision was featured in the judicial highlights (blue pages) section of the Federal Reporter advance sheets dated January 9, 1978, page 1. The case is very similar on its facts to *DiGiangiemo* and the New Jersey Court also sustained the defendant's claim of collateral estoppel. However, that court followed a substantially different line of reasoning and reached a somewhat different conclusion. There are many underlying policy considerations touching upon the collateral estoppel doctrine, said the court. However,

> "The more persuasive consideration is the public impression of unfairness and unevenness in the judicial process when, in identical circumstances one defendant goes free and his co-defendant stands convicted.
>
> * * *
>
> "Despite our misgivings as to the broader implications of extending the collateral estoppel doctrine, the facts of this case present such a classic example of unfairness that we feel constrained to offer the defendant the benefit of the earlier rule invalidating the search. * * * Under these exceptional circumstances, we think that the basic goal of fairness in the administration of justice is better served by requiring consistency in outcome," *Id.*, 1134-1135.

Applying *Gonzalez* to the present case, to send the defendant to jail upon a judge-made conviction after a jury has found him guilty of *no* wrongdoing creates the same impression of unfairness and unevenness upon which the *Gonzalez* court based its ruling.

It is further to be noticed that *Gonzalez* laid down a flexible rule for the application of collateral estoppel to the situation of two defendants separately tried. All of the circumstances surrounding the conviction of the one defendant must be examined in order to determine if his conviction should stand even though his co-defendant, separately tried, was released. Petitioner would urge that the reasoning of *Gonzalez* is directly applicable to the present case where only one defendant is involved. Where the conviction comes before the acquittal as in the present case, it is obvious that there are no double jeopardy implications. Likewise, when two defendants are separately tried, and one is convicted and the other acquitted, there can be no double jeopardy considerations. This does not mean that there can be no fairness considerations which must be weighed in determining whether the defendant who was convicted should also be released. As applicable to the case in hand, petitioner likewise urges that both trials must be analyzed and the defendant afforded the benefit of the estoppel, if there are any elements of unfairness, is the enforcement of the conviction in light of the findings at the trial which resulted in an acquittal.

Petitioner submits that there is a ready explanation for the fact that the first trial resulted in a conviction and the second resulted in an acquittal. Judge Holland in his general verdict of guilty failed to consider the obstruction of justice issue. The jury, specifically charged thereon directly acquitted petitioner of obstruction.

It is obvious that neither the District Court below nor the Fifth Circuit panel has applied the flexible estoppel rule enunciated in *Gonzalez*. Neither the District Court below nor the Fifth Circuit panel has examined this convic-

tion in the light of the subsequent acquittal for its fundamental fairness. This Court should perform such an analysis or reverse the case and order the Courts below to do so.

The present issue may be viewed as an independent claim or as a supplement to petitioner's first issue. The issues are complementary but the present issue is primarily aimed at *Duncan v. La.*, 391 U.S. 145 (1968).

The Texas Constitution, *Art. I*, §10 and Statutes, *Art.* 45.25, Tx. C. Cr. P. categorically provide for jury trial even for such trivial charges as littering or overtime parking, punishable by fine alone, not exceeding $200, *Freeman v. State*, 186 S.W.2d 683 (Tx.Cr. 1945); *Turner v. Pruitt*, 342 S.W.2d 422 (Tx. Sm. 1961). But it is "axiomatic" that Texas denies jury trials for contempt (A. 206). The ruling does not erase the fact that petitioner was denied a basic component of criminal justice:

> "Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guaranty.
>
> * * *
>
> "Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements under way to do so.
>
> * * *

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which laws should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.
>
> * * *
>
> "Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this instance upon community participation in the determination of guilt or innocence." *Duncan v. La.*, 391 U.S. 145, 149, 154, 155, 156 (1968).

A minority of the Supreme Court has urged that jury trial should be available for all but the most trivial offenses. *Dyke v. Taylor Implement Co.*, 391 U.S. 216 (1968); *Frank v. U. S.*, 395 U.S. 147 (1969). The present and prevailing interpretation of the Constitution is that the right of jury trial must be provided except for "petty" offenses. The term "petty" has been defined as those offenses for which the possible punishment does not exceed six months imprisonment. The right of jury trial is available even in contempt cases if the possible range of punishment exceeds six months. *Bloom v. Ill.*, 391 U.S. 194 (1968).

> "* * * Despite the important values which the contempt power protects, courts and legislatures have gradually eroded the power of judges to try contempts of their own authority. In modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases. Our experience teaches that convictions for criminal contempt, * * * are indistinguishable from those obtained under ordi-

nary criminal laws. If the right to jury trial is a fundamental matter in other criminal cases, which we think it is, it must also be extended to criminal contempt cases," *Id.* 207-208.[12]

Due process of Law forbids any practice or rule which "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Synder v. Ma.*, 291 U.S. 97 (1934). *Duncan* declared the right of jury trial to be fundamental. Does it not offend that fundamental right to imprison on this basis of these judge-made convictions after a jury has declared the accused not guilty of the charges found against petitioner?

> "Due Process is that which comports with the deepest notions of what is fair and right and just." *Solesbee v. Balkom*, 339 U.S. 9, 16 (1950) (Dsnt.)

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[12]By logic, criminal contempts should be surrounded by more procedural safeguards to a fair trial rather than less, because contempt is a subject matter, by the very nature of which, many judges will possess pre-conceived notions. While calling another judge will help the situation, it cannot go as far in assuring an unbiased tribunal as calling a jury. There is also the fact that, with modern day means of communication and transportation and modern day propensities to attend convictions, meetings and conferences, it will be found in practically every instance that the complaining judge and the judge selected to try the case will be well acquainted, perhaps even close friends. Almost certainly, the judge selected to try the case will be prone to be more sympathetically inclined toward the complainant than the accused. It is permissible to strike out a venireman who admits to a close acquaintanceship with the complaining witness. And, what competent trial attorney would fail to strike out veniremen with such leanings; even a venireman of the same occupation as the complaining witness? However, it is not possible to strike out the judge with a peremptory challenge. He may be challenged only for cause, upon a showing of bias and prejudice; a showing which the previous appeal of this matter held was not sufficiently made. In comparison with other crimes, jury trial is more desirable in contempt, rather than less.

> "Due Process of Law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a 'sense of justice.'" *Rochin v. Ca.*, 342 U.S. 165, 173 (1952).

Chambers v. Ms., 410 U.S. 284 (1973) declared that the accused must have "a trial in accord with traditional and fundamental standards of due process" *Id.* 302. Any procedures which call into question the ultimate "integrity of the fact-finding process must be closely examined" *Id.* 295.

The historic basis for jury trial is to safeguard against bias and prejudice that can emanate from a single trier of fact. The case in bar reflects that at the disbarment, a multi-member panel of fact finders has ruled in petitioner's favor, but a single fact finder has ruled against him. If this be a democratic society, the majority will prevail. In *Preston v. Blackledge*, 332 F. Supp. 681 (E.D. N.C. 1971), twelve fact finders found guilt, but forty-eight were unable to agree casting a pall over the finding that the accused was, in fact, guilty beyond a reasonable doubt. Presently, a multi-member jury could not find guilt even upon a preponderance of the evidence, casting a similar pall upon the single trier's finding of guilt beyond reasonable doubt.

The trial Court's hypothetical concerning the poker game robbery is yet incomplete. In order to make the situation parallel, it must be assumed that the particular state fixes six months maximum imprisonment for poker game robbery and a jury was denied upon the first five prosecutions. The verdict of guilt was general. The sixth action was by the state to obtain indemnity for its fund for the compensation of the victims of crime. A jury was provided

to decide the civil action upon a preponderance of the evidence and the jury by special verdict answered the identity issue in favor of the defendant. Would the trial Court's finding of "no fundamental unfairness" remain the same? We think not.[13]

Historically, the contempt power was viewed as the royal prerogative of the judges who viewed themselves as the king's personal representatives. As listed at the outset of this issue, many of the accepted due process safeguards of a criminal trial are unavailable in a contempt case. Both time and space limitations prohibit extended discussion. However, the jursdictional statement in *Howell v. Jones*, U.S. S.Ct. No. 72-1448 (Filed April 24, 1973), is a part of the record in this case (R. 381-541) and treats the matter at length. On the prior appeal, this Court found that the summary ruling thereon by the Supreme Court was, in effect, a collateral estoppel against this petitioner. But that is entirely beside the present point. The fact that the Supreme Court approved of the use of shortcut criminal procedure in contempt cases only serves to emphasize that the jury verdict in a plenary trial employing all the ac-

[13]We return to the case of **One Lot Emeralds v. U. S.** Assume that the accused was there charged with a violation of the customs laws providing a maximum punishment of six months plus $500 fine. Assume that the Court ruled (correctly) that the Sixth Amendment did not entitle him to jury trial and he was convicted by the judge sitting alone. Thereafter, while he was still free on bail and his conviction was being contested on appeal, assume that he was brought to trial in a civil forfeiture proceedings. In accordance with the Seventh Amendment guarantee of a jury trial in civil actions involving more than $20, assume that the defendant asked for and received a jury trial. Assume that the jury found all the facts in favor of the defendant. Under these circumstances, petitioner presents that it would violate accepted notions of fundamental fairness to enforce the conviction resulting from a jury-denied trial when the government failed to recover a jury verdict by a mere preponderance of the evidence.

cepted procedures is entitled to greater credence and that contempt judgments must yield thereto.

Attention is also directed to propositions four and five immediately below. The jury directly and unequivocally acquitted petitioner of obstruction of justice. The record strongly indicates that Judge Holland was not apprised that obstruction of justice is an element of the offense. It is doubtful if he decided that petitioner was, beyond a reasonable doubt, guilty of any such obstruction. The entire argument under propositions Four and Five goes to reinforce the proposition here being urged under number Three, that disparities and deficiencies between the two judgments render it fundamentally unfair and a violation of Fourteenth Amendment Due Process to adamantly and blindly adhere to a rule of "first in time, first in right."

There is yet another matter to consider in deciding if Fourteenth Amendment fundamental fairness standards will be offended by sending petitioner to jail to serve out his sentence after a jury has decided the crucial issues of the case in favor of the accused. We refer to those clandestine conferences between the trying judge, the Honorable Louis T. Holland, the complaining judge, the Honorable Dee Brown Walker, and the special prosecutor, Mr. Coleman.

Shortly before the contempt trial, Judge Walker wrote a confidential letter to Judge Holland castigating petitioner Howell and lauding his own handling of the case and "long suffering" indugence of the petitioner's alleged misconduct. Judge Walker testified that Judge Holland invited the letter or at least that "He knew * * * [it?] was coming"

and that Judge Holland said " 'Just send it to me.' " (A. 251). There was at least one and possibly two conferences between these judges concerning the case and on one occasion, they were joined by the special prosecutor, Mr. Coleman (A. 307, 309). Judge Walker urged in his letter that the burden of proof had shifted. Judge Holland indicated his agreement (A. 279), but he never notified petitioner of the burden being imposed upon him. Thus, petitioner was tried without being notified of the burden of proof beng cast upon him. He did not receive a wholly public trial as required by the Sixth and Fourteenth Amendments.

Time and space do not permit further discussion, but these facts were discussed in detail in the previous application for writ of certiorari, *Howell v. Jones,* No. 75-953 (docketed January 5, 1976). The Fifth Circuit rejected the previous appeal on the ground that petitioner had not proved that the foregoing matters had "any effect on the trial judge's determination of the merits" and we must accept the estoppel, collateral or otherwise, of that ruling. However, that is not to say that these matters never occurred. It is not to say that they can or must be disregarded.

The picture has now completely changed. In a related case, a jury has effectively acquitted petitioner of the matters for which he was convicted by Judge Holland and petitioner is arguing the due process fundamental fairness test of the Fourteenth Amendment. It is urgently suggested that, in applying this test, the Court must consider all relevant facts, the entire picture.

(1) Regardless of actual bias, Judge Holland unquestionably failed to conform to high standards requiring

that "Justice must satisfy the appearance of justice," *Mayberry v. Pa.,* 400 U.S. 455 (1969).

(2) The record raises doubt as to whether he applied the constitutional standard laying the entire burden of proof upon the prosecution, granting the presumption of innocence and requiring proof beyond reasonable doubt.

(3) Likewise, while the jury acquitted petitioner of obstruction of justice, the record indicates that Judge Holland never passed upon this vital issue.

(4) The convictions were not secured according to the accustomed standards of criminal trial, but according to the reduced standards of a contempt trial.

(5) The right to jury trial occupies a particular preeminence in our democratic society. A multipartite group of the defendant's fellow citizens, selected from the community at random, has declared him "not guilty."

(6) Finally, we would remind the Court that the maintenance of public confidence in the judicial system is "always more important than sustaining the inflictions of punishment in a particular case," *Sacher v. U. S.,* 343 U.S. 1, 33 (1952) (Dsnt., Frankfurter, J.). It violates the public's sense of fundamental fairness to send a person to jail after a jury has declared him "not guilty." A fortiorari, it is violative of the fundamental fairness strictures of the Fourteenth Amendment.

FOUR

THE RECORD FAILS TO REFLECT THAT JUDGE HOLLAND CONVICTED PETITIONER OF OBSTRUCTION OF JUSTICE

FIVE

ALTERNATIVELY, THE RECORD ON THE POINT IS INADEQUATE TO STAND IN OPPOSITION TO THE JURY VERDICT

(1) *An Acquittal For Prejudice To The Administration Of Justice Is An Acquittal For Obstruction of Justice*: We are not unmindful that in the disbarment suit, the jury answered "Yes" to the special issue inquiring if petitioner failed to answer a question relating to his motion for continuance when he was instructed by Judge Holland to answer. However, the jury went on to answer "No" in response to an inquiry if petitioner thereby "engaged in conduct that was prejudicial to the administration of justice" (R. 2592-2593). Viewing the jury verdict with "realism and rationality" as commanded in *Ashe v. Swenson*, this amounts to a finding that the defendant is not guilty of obstruction of justice and prevents his imprisonment for contempt.

At the outset of the original contempt hearing, petitioner made a motion for continuance and testified in support thereof that he had consulted with four attorneys who declined to become involved. On cross-examination, he refused to give their names, stating that to do so would violate their desire for non-involvement. He attempted to withdraw the matter (A. 40-43). Judge Holland reacted in two ways. He convicted petitioner of contempt and he also immediately overruled the motion for continuance (A. 43, 142). Petitioner has contended throughout that the original contempt trial continued without delay, that the prosecution was not hampered in the prosecution of its case and that no one was hurt except the petitioner himself. The jury in the disbarment case obviously accepted petitioner's

contentions and found no conduct prejudicial to the administration of justice (P.A. 3-8). Setting the inquiry " 'in a practical frame * * * viewed with an eye to all the circumstances of the proceedings,' " *Id.* 444, this is the direct equivalent of a verdict that the petitioner's conduct did not amount to an obstruction of justice. See also *Johnson v. Estelle*, supra.

(2) *Obstruction Of Justice Is A Crucial Element Of The Crime Of Contempt*: Because of its summary nature and the extremely elastic contours of the offense, the contempt power contains great potential for abuse. One of the principal constitutional limitations upon the contempt power is that it may not be used by the judge to punish slights, indignities or personal affronts. Neither may it be used to punish mere insubordination or failure to comply with a judge's whim. There must be an actual, direct and material obstruction of justice. Reasonable minds might differ as to whether or not the conduct of petitioner on the occasion in question constituted an obstruction of justice. However, a lawfully appointed jury has spoken and it has spoken in the negative. Petitioner has been acquitted of obstruction of justice and his contempt conviction must fall.

The authorities in point were recently and ably reviewed in the case of *Edmunds v. Chang*, 365 F. Supp. 941, 946-947 (D.C. Hi. 1973), rvsd.oth.gds. 509 F.2d 39 (9-Hi. 1975). The record must reflect the need for immediate penal vindication of the dignity of the court. *Cooke v. U. S.*, 367 U.S. 517, 536 (1925). There must be an obstruction clearly shown. *In re Michael*, 326 U.S. 224 (1945). There must be a need for immediate punishment to present demoralization of the court's authority. *In re Oliver*, 333 U.S. 257, 275 (1948). There must be an imminent, not mere-

ly a likely threat to the administration of justice. *In re Little,* 404 U.S. 553, 555 (1972). See also *In re McConnell,* 370 U.S. 230 (1962); *Taylor v. Hayes,* 418 U.S. 488 (1974), and *U. S. v. Seale,* 461 F.2d 345 (7-Il. 1972).

(3) *The Judgment N.O.V. Is Immaterial To This Case of Criminal Contempt*: Petitioner has not overlooked the fact that the Honorable Frank Wear, who presided at the disbarment trial "set aside" the jury finding that there was no prejudice to the administration of justice and entered judgment n.o.v. against petitioner assessing a reprimand as punishment (P.A. 8). Petitioner presents three points in response:

First Point: The ruling is a clear violation of Petitioner's Fourteenth Amendment rights and thereby void. Disbarment is a quasi-criminal proceedings, *In re Ruffalo,* supra. In so holding, the Supreme Court relied upon *In re Gault,* 387 U.S. 1 (1957), a case holding that juvenile proceedings are quasi-criminal and must be tried as such even where they are denominated by a state as civil actions.

In view of *Gault* and *Winship,* supra, we do not hesitate to say that, if a juvenile case were ever submitted to a jury, the jury verdict must prevail and the judge presiding at the trial may not, under the Constitution, "set it aside" and substitute therefor his own findings. Neither will the Constitution permit the prosecution to contend on appeal that the evidence will not support the findings of a juvenile court judge hearing the evidence without a jury, where the ruling is in favor of the accused. It is a matter of state law whether or not a jury shall be provided in disbarments or in juvenile proceedings. (Texas law provides for jury trial in juvenile cases.) However, if the state grants the right of jury trial, the Fourteenth Amendment prohibits a

state court judge from "setting aside" jury findings in such quasi-criminal actions. See *Smith v. Tx.,* 311 U.S. 128 (1940), and *Griffin v. Il.,* 351 U.S. 12 (1955).

Second Point: We alternatively present that "setting aside" a jury verdict is mere alliteration, a figure of speech, semantics. The jury was properly selected, sworn and empanelled. It was charged to decide if there was an obstruction and its answer was "No". It is no more possible to "set aside" the verdict than it is to unring a bell or reinsert toothpaste in a tube. In final analysis, the most that the judge presiding over a jury trial can do is refuse to follow the verdict. Wherever a judgment n.o.v. is rendered, it is merely a figure of speech to say that the verdict has been "set aside." It remains a *jury verdict.*

Judge Wear was authorized to write a judgment in the disbarment case. It follows that he had the jurisdiction, the naked power to write a judgment *in the disbarment case* which did not follow the jury verdict. We think he erred, but we submit that it makes no difference. He had no jurisdiction, utterly no power to decide the effect of the jury verdict *upon the contempt convictions.* The jury verdict created the collateral estoppel and nothing done by Judge Wear could affect it because (repeating for emphasis) he had no jurisdiction over the contempt judgments. Although not directly in point, both *Turner v. Ar.,* supra, and *Simpson v. Fl.,* supra, are illustrative.

Assume the state brings a damage action against a former employee for conversion of state property. The jury verdict is for the defendant, but the judge presiding at the trial enters judgment n.o.v. for the state. Have any constitutional rights been violated? We doubt it. If the judge's action be upheld on principles of state law, the judgment

must be paid. With respect to ordinary civil actions, state court judgments n.o.v. have not been held unconstitutional.

Assume further that the state employee is later brought to trial for the theft of that same property. Does the judgment n.o.v. which "set aside" the civil jury verdict destroy its criminal effect as a collateral estoppel? Petitioner submits that the constitutional concept of a criminal jury trial compels the conclusion that the judge's ruling upon the civil effect of the verdict has no bearing upon a related criminal action. To hold otherwise is to allow a judge to do by indirection that which he cannot do by direction: direct a verdict upon any crucial issue in a criminal case.

While the Supreme Court has denominated disbarment as quasi-criminal, it has held that "criminal contempt is a crime in the ordinary sense; * * *. 'If such acts are not criminal, we are in error as to the most fundamental characteristics of crimes * * *' " *Bloom v. Il.*, supra. It is clearly contrary to the Ango-American concept of trial by jury for the judge ever to "set aside" or overrule the verdict in a criminal case. *United Brotherhood v. U. S.*, 330 U.S. 395, 408 (1947); *U. S. v. Hayward*, 420 F.2d 142 (C.A. D.C. 1969). A jury has the power to proceed in opposition to all the evidence. It may acquit solely on account of compassion or even because of prejudice against the prosecution or the complainant.

If a jury had been empanelled to hear the contempt charges against petitioner and if Judge Holland had attempted to "set aside" the verdict and enter his own findings, contrary to the jury findings, this Court would unhesitatingly hold that such is constitutionally impermissible. It follows that Judge Wear, a judge without jurisdiction,

could not do that which Judge Holland, whose jurisdiction is not presently questioned, could not do.

Whether or not the jury verdict in the disbarment was validly "set aside" *for purposes of the disbarment case* begs the question. The verdict remains as a valid final determination by a duly constituted jury. As such, its effect as a collateral estoppel in a related criminal case is undiminished by any action of the judge presiding over the disbarment trial. For purposes of this criminal case, the verdict cannot be "set aside," its effect remains undiminished.

Third Point: If we be in error with respect to either of the above premises, then we would show that petitioner has timely appealed the action of the judge who presided in the disbarment case. His order attempting to "set aside" the jury verdict is not final and is still under review. If his order affects the efficacy of the verdict as a collateral estoppel in this criminal case, then petitioner requests a stay of proceedings in the case at bar until Judge Wear's "set aside" order has been reviewed.

Petitioner has already advised this Court that the "set aside" judgment was affirmed by the intermediate Court and further review is being sought from the Texas Supreme Court.[14] Petitioner Howell has also filed suit in

[14]The Texas Court of Civil Appeals held that obstruction of justice was "a question of law for the court" and that neither this jury nor any other jury should ever be charged upon the issue. The Court proceeded to hold that "in our opinion," petitioner's conduct was, in fact, an obstruction of justice. **Howell v. State,** supra, 559 S.W.2d at 434-436.

We deny that it is constitutionally permissible, in a disbarment, to contort that which is so obviously an issue of fact into an issue of law. But such is presently immaterial. Most certainly, it would be constitutionally unacceptable in a criminal action for a state court to first charge a jury upon obstruction of justice and there-

(Continued on Page 54)

the United States District Court for the Northern District of Texas seeking a declaration that the disbarment action against him was being prosecuted in violation of the Constitution and Laws of the United States. *Howell v. State Bar,* No. CA3-76-280-C (N.D. Tx., filed Feb. 9, 1976). The District Court filed an abstention order on March 4, 1976 (P.A. 29) and the Fifth Circuit has affirmed the abstention order without opinion. *Howell v. State Bar,* 551 F.2d 861 (1977).[15]

Petitioner again urges that even if the "set aside" order be valid with respect to the disbarment suit, it has no effect upon the related convictions for criminal contempt. If petitioner be overruled on the point, petitioner urges that the abstention orders necessarily require a stay of proceedings in the present case until petitioner has been provided with an opportunity for direct federal review of the disbarment proceedings in Cause No. 76-280-C now pending in the Northern District of Texas.

(4) *The Contempt Judgment Did Not Include A Conviction For Obstruction of Justice*: The District Court

(Continued from Page 53)

after enter a judgment of guilt on grounds that the defendant had freely admitted the commission of the act alleged to be an obstruction of justice and whether the conduct constituted an obstruction was "a question of law for the court." Petitioner urges that the rulings of the Texas courts as to the proper cleavage between a question of law and a question of fact **in a disbarment action,** cannot destroy the verdict which the state court could not have constitutionally destroyed had it been rendered in the case at bar.

[15]On April 14, 1977, petitioner moved the District Court for trial upon the merits forthwith and the District Court renewed its previous abstention order (P.A. 30). A second appeal was docketed, **Howell v. State Bar,** No. 77-1805 (5-Tx., docketed April 19, 1976), but it was clear that collateral estoppel (a recurring term in this case) precluded relief. This appeal was dismissed at petitioner's request.

labeled the disbarment verdict as "a subsequent and inconsistent verdict." It stated "a subsequent finding * * * *on an issue* supporting a previous conviction * * * [does not undermine] the factual correctness of the earlier conviction * * *" (P.A. 14). Petitioner has previously questioned the Court's conclusion. He presently urges that the Court's premise is incorrect. (i) The disbarment verdict of "no obstruction of justice" was not a "subsequent" finding because *Judge Holland made no finding upon the point.* (ii) Likewise, the verdict of "no obstruction" was not "inconsistent" again because *Judge Holland made no finding thereon.* Obstruction is a crucial element of the offense and the verdict of "no obstruction" must prevail because it fills a constitutional gap in the contempt judgment.

The original proceedings leading up to the conviction for failure to give the names of the four lawyers are quite short (A. 40-43). Judge Holland made no statement from the bench indicating an opinion that petitioner was guilty of obstruction of justice. To the contrary, our reading of the transcript of the contempt hearing convinces us that he imposed punishment on the grounds of mere insubordination.

Likewise, there is nothing in the enrolled judgment (P.A. 2-3) to indicate that Judge Holland considered obstruction of justice to be an element of the offense or that he had passed upon the issue in any way.

Judge Holland thereafter appeared at the disbarment trial as a state's witness against petitioner (R. 2892). Petitioner objected that this was improper, that the record of the contempt proceedings was the best evidence, that the

state was attempting to bolster an unimpeached official record and that the calling of Judge Holland was an attempt to secure a conviction based upon the prestige of a district judge (R. 2581-2582). Petitioner was overruled and Judge Holland proceeded to testify, which gave to petitioner the constitutional right of a full and complete cross-examination. *Smith v. Il.* 390 U.S. 129 (1968).

Judge Holland was asked if the trial was interrupted or delayed in any way and he conceded that it was not. He repeatedly asked why the identity of the four lawyers was needed, but the only explanation offered was that he thought that the prosecution was entitled to know. How would or could the information have affected the course or outcome of the proceedings after the matter was withdrawn and the continuance expressly denied? Judge Holland failed to explain (R. 2897-2914). Paraphrasing the opinion of the District Court:

> "The court must agree that the transcript of Judge Holland's testimony from the disbarment trial shows no concern about * * * [obstruction of justice] lurking anywhere within the judicial subconscious." (P.A. 15).

In a summary contempt proceedings such as this, there is no indictment or other criminal pleading setting forth the elements of the offense. Neither is there a charge of the court to show that the elements of the offense were brought to the attention of the trier of fact. It is rare for the record to reflect much in the way of argument by counsel through which the elements of the offense might be brought to the attention of the trier of fact. For this reason, *Rule* 42(a), F.R.Cr.P., requires a federal judge to

execute a certificate setting forth all elements of the offense.[16]

Obviously, state courts are not bound by the federal rules, but they are bound to comply with constitutional due process of law. Nowhere; we repeat for emphasis — nowhere in the record of the contempt proceedings does it appear that Judge Holland ever passed upon the obstruction issue. Any doubt as to whether he passed on the issue is completely removed by his cross-examination testimony at the disbarment trial. It is fundamental that, with reference to a criminal proceedings, an appellate court may not supply crucial findings which the trier of fact failed to make in the first instance. This applies regardless of the nature of the evidence. It is doubly true with reference to a federal court reviewing state proceedings on habeas. The obstruction finding had to be made by Judge Holland in the first instance and the case must fall because he failed to do so.

(5) *The Obstruction Issue Must Be Passed Upon By The Original Trier Of Fact*: Such was the direct holding of *Kibbe v. Henderson,* supra, 497-499. The defendant was convicted of murder upon evidence showing that he robbed a drunkard and abandoned him in a roadway where he was run over by a third party. The Second Circuit found the conviction to be constitutionally infirm because the jury

[16]The Rule is strictly construed. **U. S. v. Scrimsher,** 493 F.2d 842 (5-Tx. 1974). On the strength of **Edmunds v. Chang** and other cases cited above, petitioner presents that obstruction is a crucial element of the offense. On strength of **Kibbe v. Henderson,** 534 F.2d 493 (2-N.Y. 1976), and other cases cited below, it is presented that the record must affirmatively show that the trier of fact considered all crucial elements of the offense. It necessarily follows that the conviction cannot be sustained unless the certificate contains an affirmative finding of obstruction of justice.

was not charged upon the issue of causation and therefore might not have considered the same.

> "In order to satisfy the constitutional requirements of due process, a criminal conviction must be supported by proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. * * * It is the essence of a fair trial * * * [that the trier of fact] apply the reasonable doubt standard to determine those issues of fact that bear on the elements of the offense * * *.
>
> "The omission of any definition of causation, * * * permitted the jury to conclude that the issue was not before them.
>
> * * *
>
> "The New York appellate courts * * * found that there was sufficient evidence to uphold the convictions. *We have no reason to doubt that conclusion.* * * * The sufficiency of the evidence, however, is not the subject of our inquiry. * * * As this function was within the exclusive province of the jury, the appellate courts may not substitute their own findings for the jury's possible failure to consider the issue. * * *
>
> "We are convinced that the trial judge's incomplete instructions took a necessary determination of causation of death from the jury and thereby deprived appellant of his right to due process."

The Supreme Court reversed upon the narrow grounds that the jury did, as a matter of fact, receive minimal guidance upon the causation issue and there was no objection to this part of the charge. *Henderson v. Kibbe,* 45 U.S. L.W. 4457 (1977). We think that the Supreme Court upheld

the Second Circuit in principle. For certain, the propositions laid down by the Second Circuit were not overturned. It is here submitted that they rest upon a sound constitutional base.

> "We explicitly hold that the Due Process Clause protects the accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970).

> "* * * [A defendant] whose guilt is conclusively established by [unimpeachable evidence] is denied due process if the jury is instructed that he can be found guilty by a preponderance of the evidence; that much is clear from *Winship.* * * *
>
> "The purpose of the *Winship* decision [was] to reduce 'the risk of convictions resting on factual error,' to provide 'concrete substance for the presumption of innocence,' and to ensure that 'the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.'" *Freeman v. Zahradnich,* 45 U.S.L.W. 3568 (Feb. 22, 1977) (dsnt. den. cert., Stewart, J.).

> "I agree with the Court that *In re Winship* * * * does require that the prosecution prove beyond a reasonable doubt every element which constitutes the crime charged against the defendant." *Mullaney v. Wilbur,* 421 U.S. 684, 705-706 (1975) (conc. op. Rehnquist, J.).

See also *Henderson v. Morgan,* 426 U.S. 637, 649 (1976) holding that it cannot be harmless error to deny trial upon

one of the crucial elements of the offense. Accord: *Screws v. U. S.*, 325 U.S. 91, 106-107 (1945); *U. S. v. Hayward*, 420 F.2d 142 (C.A. D.C. 1969); *Cool v. U. S.*, 409 U.S. 100 (1972), and *Hankerson v. N.C.*, 45 U.S.L.W. 4717 (June 17, 1977).

(6) *Summary*: Proposition No. 4 is unrelated to collateral estoppel. By number four, petitioner says that the record must contain an affirmative showing that the appointed original trier of fact did find the defendant to be, beyond a reasonable doubt, guilty of obstruction of justice. No quantum of evidence can cure the gap in the record because the determination in the first instance is the sole province of the appointed trier of fact.

In further support of number four, we present alternatively that the record, taken as a whole, must lend support to the premise that the trier of fact did actually consider the obstruction issue and did find the defendant, beyond a reasonable doubt, guilty of obstruction of justice. The record of the contempt proceedings, considered with the cross-examination of Judge Holland at the disbarment trial, entirely fails to support the premise that Judge Holland ever considered the obstruction issue. At a minimum, the test must be "harmless beyond a reasonable doubt," *Chapman v. Ca.* 386 U.S. 18 (1967).

By proposition five, petitioner returns to the collateral estoppel doctrine. The jury at the disbarment trial considered the obstruction of justice issue head-on and unequivocally answered "No". The record of the two proceedings taken together render it doubtful that Judge Holland ever expressly considered the obstruction issue. The "inconsistency" which the trial Court described as "inherent in the trial system" simply does not exist. The

disbarment verdict has been reconciled with the contempt conviction. As reconciled, the jury finding of "no obstruction" is not "a previously resolved issue" but a collateral estoppel de praesenti that prohibits the State from further imprisoning the petitioner.

The trial Court failed to recognize that collateral estoppel as a principle of criminal law, stands upon two legs, the second leg being the due process requirement of fundamental fairness explicated in *DiGiangiemo*. The trial Court did hold that "fundamental fairness, as embodied in Anglo-American justice, requires the state to assume the burden of proving each element * * * [of the offense]" (P.A. 14).

The facts of this case reflect that in the one instance, the obstruction issue was expressly considered by a multipartite trier of fact and the jury failed to find obstruction of justice even by a preponderance of the evidence. In the other instance, the appointed trier of fact, a single judge, was required, in order to return a conviction, to find that obstruction of justice had been proved beyond a reasonable doubt. But the record is most equivocal as to whether he actually did so. Under the circumstances presented, petitioner urges that due process fundamental fairness collaterally estops the State from imprisonment of the accused when the contempt conviction has been thusly impeached.

Conclusion

For the reasons given, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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Attorneys for Petitioner

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. 77- ——

CHARLES BEN HOWELL ..... *Petitioner*

v.

CARL THOMAS, SHERIFF,
DALLAS COUNTY, TEXAS ..... *Respondent*

PETITIONER'S APPENDIX

Proceedings In State Trial Courts

DOMESTIC RELATIONS COURT 2, DALLAS COUNTY, TEXAS; MARRIAGE OF NORMAN & EDNA RALSTON; NO. 71-8259-DR/2

JUDGMENT OF CONTEMPT
[Filed July 27, 1972]

ON THIS the 27th day of July, 1972, came on for trial the above-styled and numbered cause; and the said CHARLES BEN HOWELL, a witness in the said cause, testified that he had requested four attorneys to represent him, all without avail; and the said CHARLES BEN HOWELL being asked upon cross-examination to name those four attorneys, refused to do so; and the Court having ordered said CHARLES BEN HOWELL to answer the said

question and reveal the said attorneys' names or to be found in contempt of court, continued to refuse to answer and does at this time refuse to answer the said question;

IT IS THEREFORE ORDERED AND ADJUDGED that the said CHARLES BEN HOWELL is in direct contempt of this court and the said CHARLES BEN HOWELL is hereby committed to the custody of the Sheriff of Dallas County to be confined in the Dallas County Jail until such time as he shall purge himself by revealing the names of the said four attorneys; and the Court further finds CHARLES BEN HOWELL in contempt of this court and sets his punishment at a fine of $500.00 and confinement in the County Jail for a period of thirty days.

/s/ Louis T. Holland
JUDGE

Judge *Retired Judge* Judicial District
Court Sitting For Judge Domestic Relations
Court *No.* 2 of Dallas County, Texas

[A. 142]

162ND DISTRICT COURT, DALLAS COUNTY, TEXAS; DEE BROWN WALKER VS. CHARLES BEN HOWELL; NO. 71-8259-DR/2

JUDGMENT OF CONTEMPT
[Filed July 28, 1972]

ON THIS the 27th day of July, 1972 came on for trial the above styled and numbered cause; and the Court having heard the evidence, finds that CHARLES BEN HOWELL is guilty of contempt of the Court committed on the 26th day of May, 1971; the said CHARLES BEN HOWELL failed

to make full disclosure as to all of the facts surrounding the matters before the Court after the Court had directly inquired of the said CHARLES BEN HOWELL, as to all of the said matters;

THEREFORE, IT IS ORDERED AND ADJUDGED that the said CHARLES BEN HOWELL is guilty of contempt of Court, and the Court sentences him to pay a fine of $100.00 and commitment in the County Jail for a period of three days, and the Court hereby commits the said CHARLES BEN HOWELL to the custody of the Sheriff of Dallas County, Texas, until the fine and the term of imprisonment have been satisfied.

/s/ Louis T. Holland
JUDGE

JUDGE *Retired* Sitting for Judge
Domestic Relations Court *No.* 2 of
Dallas County, Texas

[A. 143]

101ST DISTRICT COURT, DALLAS COUNTY, TEXAS; THE STATE OF TEXAS V. CHARLES BEN HOWELL; NO. 74-9611-E

FINAL JUDGMENT
[Filed September 21, 1976]

On the 12th day of July, 1976, the above numbered and entitled cause having been called for trial, the Plaintiff appeared by and through its attorneys and the Defendant appeared in person and by and through his attorneys of record. The parties announced ready for trial and, a jury

having been demanded, a jury was duly selected, sworn and said cause proceeded to trial. After the Plaintiff and the Defendant had adduced evidence in their respective behalves both parties made motions for instructed verdicts which were considered by the Court and overruled.

On the 15th day of July, 1976, the jury, through its foreman, announced in open Court that a verdict had been reached. Such verdict was returned in open Court having been subscribed to by ten of the eleven jurors considering such verdict, a twelfth juror having been excused for cause during trial. The Court received said verdict, which is incorporated herein by reference and made a part hereof for all purposes. In answer to the Special Issues submitted to the jury by the Court, the jury stated as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that on or about the 26th day of May, 1971, at the time he obtained a default judgment in an action pending in Domestic Relations Court Number 2 involving divorce, property and custody of minor children, Charles Ben Howell did not tell Judge Walker that another action involving the same parties regarding divorce, property, and custody of minor children was pending in Domestic Relations Court Number 3?

ANSWERED: NO

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that when Charles Ben Howell did not tell Judge Walker that another action involving the same parties regarding divorce, property, and custody of minor children was pending in

Domestic Relations Court Number 3, if you have so found, that he engaged in conduct that was dishonorable?

NOT ANSWERED IN ACCORDANCE WITH INSTRUCTIONS.

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that when Charles Ben Howell did not tell Judge Walker that another action involving the same parties regarding divorce, property, and custody of minor children was pending in Domestic Relations Court Number 3, if you have so found, that he engaged in conduct which was fraudulent?

NOT ANSWERED IN ACCORDANCE WITH INSTRUCTIONS.

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that when Charles Ben Howell did not tell Judge Walker that another action involving the same parties regarding divorce, property, and custody of minor children was pending in Domestic Relations Court Number 3, if you have so found, that such conduct was willful?

NOT ANSWERED IN ACCORDANCE WITH INSTRUCTIONS.

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that on or about the 26th day of May, 1971, at the time he obtained a default judgment in an action pending in Domestic Relations Court 2 involving custody of minor children, Charles Ben Howell did not tell Judge Walker that a hearing involving the custody of minor children had been set by Judge Gibbs for June 2nd, 1971?

ANSWERED: NO

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that when Charles Ben Howell did not tell Judge Walker that a hearing involving the custody of minor children had been set by Judge Gibbs for June 2nd, 1971, if you have so found, that he engaged in conduct that was dishonorable?

NOT ANSWERED IN ACCORDANCE WITH INSTRUCTIONS.

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that when Charles Ben Howell did not tell Judge Walker that a hearing involving the custody of minor children had been set by Judge Gibbs for June 2nd, 1971, if you have so found, that he engaged in conduct that was fraudulent?

NOT ANSWERED IN ACCORDANCE WITH INSTRUCTIONS.

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that when Charles Ben Howell did not tell Judge Walker that a hearing involving the custody of minor children had been set by Judge Gibbs for June 2nd, 1971, if you have so found, that he engaged in conduct that was willful?

NOT ANSWERED IN ACCORDANCE WITH INSTRUCTIONS.

SPECIAL ISSUE NO. 9

Do you find from a preponderance of the evidence that Charles Ben Howell failed to answer a question relating to

his motion for continuance when he was instructed by Judge Holland to answer?

ANSWERED: YES

SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that when Charles Ben Howell failed to answer a question relating to his motion for continuance which he was instructed by Judge Holland to answer, if you have so found, that he engaged in conduct that was prejudicial to the administration of justice?

ANSWERED: NO

Whereupon, the Defendant Charles Ben Howell moved orally for judgment that the Plaintiff take nothing and the Plaintiff moved for Judgment, Judgment N.O.V. and To Disregard Jury Findings. On the 16th day of August, 1976, the said motions came on to be heard and the Court is of the opinion that each of the said motions should be granted in part and should be overruled in part.

Based upon the jury's answer to Special Issues 1 and 5, the Court is of the opinion and so finds that there was no professional misconduct as to Count V.A. in the Plaintiff's Second Amended Petition and based upon said issues as answered by the jury, the Court enters judgment on Count V.A. in favor of the Defendant.

The Court finds that the jury's answer to Special Issue

No. 10 should be and the same is hereby set aside, disregarded and held for naught. The Court further finds that said Special Issue No. 10 is a question of law which should be decided by the Court.

Therefore, based upon the evidence and the jury's answer to Special Issue No. 9, the Court is of the opinion that the Defendant is guilty of professional misconduct as to the Count contained in paragraph V.B. of the Plaintiff's Second Amended Petition in that he did engage in conduct that was prejudicial to the administration of justice.

Based upon said finding the Court allowed the parties time to argue and present any matters they deemed appropriate and relevant to the question of an appropriate penalty to be assessed against the Defendant for his professional misconduct, whereupon the Plaintiff and the Defendant presented oral argument.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, Charles Ben Howell be REPRIMANDED for his professional misconduct.

IT IS FURTHER ORDERED by this Court that all relief not specially granted herein is denied.

IT IS FURTHER ORDERED by this Court that all costs of Court shall be taxed against the party incurring same.

[A. 1057-1060]

Proceedings In U.S. District Court

U.S. DISTRICT COURT, N.D. TEXAS, DALLAS DIV., CHARLES BEN HOWELL v. CLARENCE JONES, SHERIFF; NO. CA-3-6,684-D.

MEMORANDUM OPINION AND ORDER
[Filed February 2, 1977]

The amended petition of Charles Ben Howell for habeas corpus relief came on for consideration before the Honorable Robert M. Hill, United States District Judge. The court has considered the petition and is of the opinion that it should be denied.

This is Howell's second federal attempt to have two state contempt convictions set aside. The facts of this case are set out in *Ex Parte Howell,* 488 S.W.2d 123 (Tex. Crim. App. 1972), and *Howell v. Jones,* 516 F.2d 53 (5th Cir. 1975). Since Howell last appeared in this court in 1973, seeking habeas corpus relief, which was denied, he has peregrinated through the Fifth Circuit on appeal and through a state civil disbarment proceeding. His disbarment proceeding rested on the same operative facts underlying his contempt citations from which he seeks relief in this court: first, an alleged misrepresentation to Judge Walker about the status of a divorce action; second, his refusal — at the contempt hearing on the former charge — to reveal to Judge Holland the names of attorneys whom he had allegedly contacted to represent him. The jury in the disbarment suit, however, found in favor of Howell. The jury answered special issues to the effect that Howell had not deceived the judge in the divorce proceedings and that his later failure to disclose the names of attorneys whom he had contacted did not prejudice the administration of

justice. (However, the trial judge entered a judgment of n.o.v. adverse to Howell). Howell claims that these subsequent jury findings collaterally estop the State of Texas from enforcing the contempt convictions. He also claims that testimony of Judge Holland at the disbarment suit revealed that the judge had not in fact insisted upon the names of the attorneys for the reason relied upon by the Fifth Circuit to affirm this court's first denial of habeas corpus.

1. *Exhaustion*

It is clear that Howell has never presented his collateral estoppel argument to any Texas court as a ground for relief from his contempt convictions. The civil disbarment generating this claim did not transpire until long after Howell's appeal to the Texas Court of Criminal Appeals in 1973. The court nevertheless holds that any recourse to state procedures would, under the circumstances of this case, be ineffective to protect Howell's rights.

The proper avenue for state relief presents a somewhat murky question in this case. Both sides agree that the county court is the most likely (though by no means certain) forum for state post-conviction relief in a misdemeanor case. See Tex. Crim. Proc. Ann. Art. 11.09. Since Dallas county courts have not, within the memory of man, granted bail for a misdemeanor habeas corpus petition, there is a near certainty that Howell's 33 day sentence[1] would be served and his case mooted before any relief was obtained. Also, under the peculiar facts of this case (which are not apparent from the record but are within the personal knowledge of the court), it is quite likely that

[1] It is the court's understanding that Howell has already served several days of the sentence.

untoward pressure to refuse bail would be exerted upon any county court hearing Howell's petition. For these reasons, the court concludes that requiring Howell to resort to state procedures would deny him any effective relief. The requirement of exhaustion is therefore satisfied.

2. *Collateral Estoppel*

Howell's argument for collateral estoppel rests upon several assumptions, some justified and some possibly not. He first assumes that the contempt proceedings were criminal and that the contempt proceedings and disbarment proceedings were sufficiently related, with identical parties and issues, to trigger collateral estoppel. This analysis is probably correct. The court entertains considerably more doubt about the effect of the n.o.v. judgment in the disbarment proceedings — setting aside the jury's verdict — and the lack of a final judgment in the disbarment case, which is now on appeal. The court will ignore these threshold problems, however, and reach the merits of the petitioner's claim.

Howell relies on *Ashe v. Swenson*, 397 U.S. 437 (1970), but in doing so seeks basically to stand the doctrine of that case upon its head. *Ashe* grew out of the robbery of six poker players in a single transaction. Ashe was tried for robbing one of the victims but was acquitted. The verdict clearly turned upon the identity of the robber. Ashe was later tried for robbing a second victim and was convicted. The Supreme Court held that the state could not relitigate the issue of identity which had been determined against it in the first trial:

> "Collateral estoppel" . . . means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue *cannot again be*

litigated between the same parties in any future lawsuit. *Id* at 443. (Emphasis added)

Because of constitutional considerations, collateral estoppel in a criminal case is not mutual. A finding of "guilty" does not bind the defendant with regard to any offenses subsequently prosecuted. Howell in this case, however, seeks to turn the constitutional shield of nonmutuality into a sword. He argues that even if an issue is determined favorably to the state in a first trial, an adverse determination in a second trial nullifies the first judgment.

Applying Howell's theory to the facts of *Ashe* yields this result: if Ashe had been separately tried and convicted of robbing each of five poker players, a verdict of acquittal in a sixth trial would nullify the first five convictions (assuming that the acquittal turned on an issue common to all six trials). Thus, under Howell's theory, not only is the state forced to relitigate an issue determined in its favor, but if it chooses to do so it must wager all the final convictions involving this issue.

This theory of collateral estoppel is novel, and, while Howell has marshalled a plethora of authority supporting collateral estoppel, none of the cases cited involve the retroactive concept here. These other cases differ markedly from Howell's not only in their mechanics — collateral estoppel is prospective only — but also in their reasoning.

While the doctrine of collateral estoppel differs from double jeopardy in that collateral estoppel is triggered only by acquittal and also need not involve the same offense, the policy behind the two doctrines is the same: to prevent the state from going forward on a previously resolved issue. Collateral estoppel evolved to remedy a practical shortcoming in the doctrine of double jeopardy: an acquitted

man could be tried again for what was theoretically a separate crime but practically part and parcel of the same transaction. "[Collateral estoppel] surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Ashe v. Swenson*, 397 U.S. at 446. Again, in *U.S. ex rel. Di Giangiemo v. Regan*, 528 F.2d 1262 (2d Cir. 1975), a case stressed by Howell (but which nonetheless lends no support to his argument), the appellate court remarked that although due process did not similarly mandate collateral estoppel in civil cases,

> "the weight of the harrassment factor is considerably increased in the criminal law," because of the disparity usually prevailing in resources between the state and the defendant and the strain of a second prosecution even if not for the identical offense.

Collateral estoppel, as an aspect of due process, thus prevents the state from harrassing and breaking the defendant on the wheel of successive prosecutions for technically different offenses. The requirement of acquittal under the doctrine of collateral estoppel means that due process does not regard the subsequent trial of one adjudged guilty for a related offense as harrassment.

Howell does not challenge the unfairness of being forced to trial in the disbarment suit — the essence of double jeopardy and collateral estoppel under due process — but rather he complains of an unfair termination of the trial. The nature of the alleged fundamental unfairness is that a subsequent and inconsistent verdict of acquittal calls into question the prior judgment of guilty in the contempt case. The court views this inconsistency as a result inherent in the trial system. It is simply a fact of our criminal justice system that different trials of the same facts will on occasion

yield different results for many reasons: different juries, different attorneys, different arguments and different trial strategies. This disparity often occurs in the conviction and acquittal of codefendants tried separately but on the same evidence. The court does not agree that a subsequent finding against the state on an issue supporting a previous conviction either undermines the factual correctness of the earlier conviction or calls into question the fairness of the earlier proceeding.

The disposition of a novel due process claim, as in this case, must necessarily be a matter of the court's ipse dixit to some extent. The court can only answer that the facts of Howell's case do not violate its sense of fundamental fairness. Fundamental fairness, as embodied in Anglo-American justice, requires the state to assume the entire burden of proving each element in related criminal cases. It requires the state to go no further once an essential element of a crime has been determined against it. This court does not, however, perceive due process as requiring the state to chance voiding otherwise final convictions by undertaking the vagaries of jury trial on related offenses.

3. *The First Amendment Claim*

Howell, in his first application for habeas corpus in this court, attacked the summary contempt conviction entered by Judge Holland as a violation of his associational privileges under the First Amendment. At the trial of the original contempt citation, defendant Howell requested a continuance for the reason that he could find no attorney to represent him, even though he had talked to four attorneys. The state demanded to know the names of the attorneys; Howell balked on grounds of "privilege" and

ultimately attempted to withdraw the motion for continuance. But Judge Holland refused to let him withdraw it and held him in contempt when he persisted in refusing to divulge the names.

When Howell first asserted this claim on habeas corpus, this court did not advert to his attempted withdrawal. On appeal, the Fifth Circuit remarked that even if Howell had attempted to withdraw his motion, the names of the attorneys were still relevant to ineffective assistance of counsel. 516 F.2d at 58. Howell now argues that the subsequent testimony of Judge Holland at the disbarment suit establishes that the Fifth Circuit was in factual error.

The court must agree that the transcript of Judge Holland's testimony from the disbarment trial shows no concern about ineffective assistance of counsel lurking anywhere within the judicial subconscious. The court must therefore reconsider this claim as it relates to the summary contempt.

The court rejects Howell's contention that the Fifth Circuit implicitly accepted his claim of a First Amendment associational privilege to keep the names of the attorneys confidential. The appeals court clearly doubted the existence of such a privilege but it preferred to resolve the claim on grounds other than the existence vel non of such a privilege. This court likewise prefers to avoid this question since it is not necessary for disposition of the case.[2] If any such creature existed, petitioner clearly waived it

[2] The court will observe that petitioner has cited no relevant authority for such a privilege. The legislative contempt cases, e.g. Deutsch v. United States, 367 U.S. 456 (1961), are clearly inapposite. They turn not on an associational privilege to protect the identities of one's acquaintances but rather on a strict standard of "pertinency" built into a statutory definition of contempt. 2 U.S.C. §192.

by making the motion for continuance. This hypothetical privilege departed the courthouse the moment Howell took the witness stand and asserted the need for a continuance because he had unsuccessfully contacted four lawyers to represent him.

The court must also consider a more general claim that, aside from any privileges, the names of the attorneys were immaterial. There is some authority that refusal to answer a question not pertinent to an issue before the court or a grand jury cannot constitute contempt. *E.g., Ex parte Jennings*, 240 S.W. 942 (Tex. Crim. App. 1922). One could certainly make a constitutional argument to this effect based on due process. But one must distinguish the rather strict standards of relevancy applied to a grand jury fishing expedition or a congressional witchhunt — situations in which very powerful institutions threaten an involuntary witness's personal freedom and reputation — from the normal run of court business. In the latter situation, the need for protection of the individual is considerably less, and the necessity of allowing the trial court wide latitude to determine relevancy is essential to the orderly administration of justice.

In the instant case, the identity of the phantom attorneys was relevant to the matter of the continuance, brought before the trial court by Howell. The trial judge refused to allow Howell to withdraw the matter when pressed. The court can ascertain no absolute right on Howell's part to unilaterally do so without the judge's permission. Judge Holland was well within his rights in then and there pursuing the matter to its conclusion — rather than having it resurface in a petition for post-trial relief. It was not necessary for him to articulate a specific additional

rationale, such as ineffective assistance of counsel. The court holds that Judge Holland's refusal to allow Howell to withdraw the motion did not rise to a constitutional level. His order that Howell reveal the names of the attorneys was relevant and likewise fails to constitute any violation of due process.

For these reasons, the Court is of the opinion that the petition for habeas corpus relief should be denied.

It is so ORDERED.

[A. 1061-1068]

ORDER [OVERRULING MOTION FOR REHEARING]
[Caption as immediately foregoing; filed Feb. 16, 1977]

Petitioner's Motion for New Trial — Petition for Rehearing came on for consideration before the court, the Honorable Robert M. Hill, United States District Judge. The court has considered the Motion — Petition and the court is of the opinion that it should be denied.

It is so ORDERED.

[A. 1070]

JUDGMENT
[Caption as immediately foregoing; filed October 4, 1977]

This action came on for consideration before the Court, Honorable Robert M. Hill, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that the petition of Charles Ben Howell for habeas corpus relief should be, and it is hereby denied.

[R. 2109]

Proceedings In The Fifth Circuit

U.S. COURT OF APPEALS, FIFTH CIRCUIT; CHARLES BEN HOWELL V. CARL THOMAS, SHERIFF; NO. 77-1,633.

OPINION

[Delivered Jan. 16, 1978; 566 F.2d 470]

Summary Calendar.*

Before THORNBERRY, RONEY and RUBIN, Circuit Judges.

PER CURIAM:

Appellant Charles Ben Howell, a Texas attorney, was cited for contempt in a Texas state court for failure to disclose collateral legal proceedings when questioned by the judge during default proceedings in a divorce case. A second contempt charge occurred during the hearing on the first contempt charge when appellant refused to name any of the four attorneys he had allegedly approached to defend him. This Court examined the case and denied relief in a former appeal from a denial of a 28 U.S.C.A. §2254 petition. *Howell v. Jones,* 516 F.2d 53 (5th Cir. 1975), *cert. denied,* 424 U.S. 916, 96 S.Ct. 1116, 47 L.Ed.2d 321 *reh. denied,* 425 U.S. 945, 96 S.Ct. 1687, 48 L.Ed.2d 189 (1976).

The issues presented here have not been presented to the state courts. The district court ruled that "requiring Howell to resort to State procedures would deny him any effective relief. The requirement of exhaustion is therefore satisfied."

★Rule 18, 5 Cir.; **see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al,** 5 Cir. 1970, 431 F.2d 409, Part I.

[1] Appellant argues that in a disbarment proceeding following his conviction for contempt, a jury found in his favor on essentially the same facts. He contends the enforcement of the contempt order is thus collaterally estopped. No cases have been found which support the novel contention that the outcome of a second proceeding can collaterally estop the effect of an already concluded prior proceeding.

[2, 3] Appellant makes several further contentions: due process principles of fundamental fairness prohibit punishment in this case, the record fails to reflect that the state judge convicted petitioner of obstruction of justice, or, alternatively, the record is inadequate to stand in opposition to the jury verdict, and there was a variance between the charges and the evidence. None of these contentions are sufficient to justify relief in a federal court. The argument that the factual basis of the Fifth Circuit's prior opinion is incorrect misconceives both the prior opinion and the authority of one panel to overrule the decision of another panel of this Court.

A thorough examination of all appellant's contentions on appeal lead to the conclusion that the denial of Howell's petition for §2254 relief must be

AFFIRMED.

JUDGMENT

[Caption as immediately foregoing;
entered Jan. 16, 1978]

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court, upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

CLERK'S NOTICE

[Caption as immediately foregoing;
dated March 17, 1978]

This is to advise that an order has this day been entered denying the petition( ) for rehearing, * * and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

PLAINTIFF'S EXHIBIT
3-9-73
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DEE BROWN WALKER
JUDGE 162ND DISTRICT COURT
DALLAS, TEXAS 75202

July 14, 1972

Honorable Louis T. Holland
Box 57
Montague, Texas

EMPHASIS SUPPLIED BY PETITIONER

RE: No. 71-8259-DR/2
In the Matter of the Marriage of
Norman Clark Ralston and
Edna Dell Morgan Ralston

Dear Judge Holland:

Carefully reading Articles 1911 and 1911A, we are of the opinion that on our finding and declaration of contempt by Charles Ben Howell, we have presented a proper charge against him which he is entitled to have heard before a judge other than the judge sitting at the time of the offense. The exact provision of Article 1911A that influences our judgment is Provision (c): "Provided, however, an officer of a court held in contempt by a trial court, shall, upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Said judge to be appointed for that purpose by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred."

It would seem that the obligation falls upon you to make a determination of guilt or innocence upon our Declaration and Certificate of Contempt and to assess a punishment. We have heretofore indicated that the first contempt falls within Article 1911, punishment for which is limited to $100.00 fine and 72 hours in the common jail as maximum penalty, and the second contempt is covered by Article 1911A effective August 30, 1971, authorizing punishment of not more than $500.00 or confinement in the county jail for not more than six months or both.

We are sorry that we were not available at the time you left, and we believe that the enclosed copies provide you with the appropriate instruments upon which you should proceed. It is our understanding that the determination of the Certificate of Contempt is the primary fact finding, and that probably the burden of going forward will rest on Charles Ben Howell to rebut the determination heretofore

PLAINTIFF'S EXHIBIT
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made. The cases do not resolve this matter for us, and I can cite you to no authority from my interpretation, but I am conscious of federal cases that would indicate his right to a confrontation involvement of the facts on a charge communicated to him and an adjudication and punishment after a trial on the charge. My understanding of the proceeding would be to confirm the Declaration and Certificate of Contempt by nominal testimony as to the facts upon which the Court has concluded contempt, and then consider what defense, if any, Mr. Howell has before adjudging him guilty or innocent and fixing his punishment, if any.

It has been our consideration that the monetary elements in this matter are of little significance in comparison to the other factors, and under these circumstances, we have on our own motion attempted to be extremely careful that Mr. Howell is accorded every right, every consideration and every indulgence a long suffering court can give to one of its officers in passing on the propriety of that officer's relation to his duty to the court. You will note that in this spirit in vain the determination to have a judge other than the offended presiding officer pass on the guilt or innocence of the contempt found and punishment, if any, therefor, was done on the Court's own motion as was the release of Mr. Howell on his personal recognizance until the matter could be adjudicated by a judge not heretofore participating in any of the proceedings. In a different situation, we might have proceeded to dispose of the matter more summarily, but under all of the circumstances, we have elected to accord to Mr. Howell every privilege we can envision he might have regardless of whether he has requested it or not.

Yours truly,

DEE BROWN WALKER
JUDGE OF THE 162ND JUDICIAL DISTRICT
COURT SITTING FOR THE DOMESTIC
RELATIONS COURT NO. 2 IN AND FOR
DALLAS COUNTY, TEXAS

R1748

March 24, 1972

3400 Republic National
Bank Building
Dallas, Texas 75201

Mr. Louis J. Weber, Jr.
Attorney at Law
4230 Republic National Bank Tower
Dallas, Texas 75201

Re: Charles Ben Howell

Dear Lou:

Recently, Judge Dee Brown Walker requested that I have a member of the Committee contact him in reference to the filing of a complaint against Mr. Charles Ben Howell, relative to his actions in connection with a case that was then pending before Judge Walker.

I advised the Judge that I would do so, and that it would be necessary that we have something in writing to use as a basis of the complaint, so that we could furnish Mr. Howell with that information.

Judge Walker requested that I have someone from the Committee contact him, and that is the purpose of this letter.

Would you please contact Judge Walker and work with him in getting the necessary written documentation as to form the basis of a complaint by Judge Walker concerning the alleged acts and conduct of Mr. Howell that might fall within the jurisdiction of the Grievance Committee.

Thanking you for your consideration in this matter, I remain

Sincerely,

Phil Burleson

PB/mg

DEE BROWN WALKER
JUDGE 162ND DISTRICT COURT
DALLAS, TEXAS 75202

September 3, 1974

EMPHASIS SUPPLIED
BY PETITIONER

Mr. Jerry L. Buchmeyer, Chairman
Grievance Committee
2300 Republic Bank Building
Dallas, Texas 75201

Dear Jerry:

Your letter of 29 August 1974 addressed to the county and district judges has been received by me.

In May of 1972 I filed a complaint against Charles Ben Howell. I understand that a suit was to be filed on him last month, but I find no record of it.

Will you please notify me of the status of this complaint?

Yours truly,

DEE BROWN WALKER

DBW:e

DALLAS TIMES HERALD, Thursday, July 15, 1976 ····C—5

Jury may get disbarment case today

Charles Ben Howell . . .
. . . nears end of trial

By PAUL WEST
Staff Writer

The disbarment trial of Republican judicial candidate Charles Ben Howell was expected to go to the jury today following final arguments by both sides in 101st District Court here.

In testimony Wednesday, Howell was labelled "a sick man" by District Judge Dee Brown Walker, his opponent in the November general election race for the 162nd District Court bench.

Howell, 51, of Dallas, is accused of professional misconduct by the State Bar of Texas in connection with a 1971 case in which he allegedly failed to disclose all facts of a divorce action to Walker when he asked him to award custody of children to his client.

The state bar rested its case Wednesday afternoon following an appearance by Walker, who filed the original disbarment complaint against Howell in 1972.

Walker disputed Howell's testimony that he informed the judge of another pending case involving his client when he sought a ruling from Walker in May 1971.

"He did not," Walker said bluntly, when questioned about Howell's actions by state bar attorney Stan McMurry of Dallas.

Howell testified Tuesday he informed Walker of the existence of the other suit but didn't provide details "because Judge Walker didn't ask."

But Walker contended Howell had a duty as a lawyer to provide the information without being asked.

"Part of the judicial system is the responsibility on the lawyer to be candid and open to a judge," Walker testified. "And they have just as much responsibility to see that justice is done as I do."

Walker said he considered Howell "a sick man" and that "many members of the bar and bench" agreed with him.

"Practically all of them (Dallas lawyers and judges) think something's wrong with him," testified Walker.

"Mentally wrong?" asked McMurry.

"Yes, sir," replied the judge.

Walker named Dallas attorneys William Pritchard and Larry Anderson and Dist. Judges Ted Robertson, Hugh Snodgrass and Fred Harless among those who agreed with his assessment of Howell.

"I don't think he ought to have a (law) license," concluded Walker.

Walker, who has served 13 years on the county district bench, acknowleged under cross examination that if Howell is disbarred it will disqualify him from the November election race.

Howell, a four-time loser in county judgeship contests, faces reprimand, suspension or revocation of his legal license if the jury rules against him.

In testimony Wednesday Howell flatly denied violating professional ethics in his handling of the divorce case.

Asked by defense attorney Waggoner Carr, former Texas attorney general, if he had behaved fraudulently or broken the professional ethics code in handling the divorce action, Howell replied, "No, sir."

The defense said it hoped to call several character witnesses on Howell's behalf when the trial resumed at 9 a.m. this morning, but a series of rulings by presiding Judge Frank Wear of Paris cast doubt they would be allowed to testify.

Wear said he did not think character witnesses were allawed to testify in civil cases and asked lawyers for both sides to present arguments on the question when court convenes this morning.

The jury will decide the case but Wear must set the penalty, if the jury rules against Howell.

8—A Wednesday, November 3, 1976, DALLAS TIMES HERALD

Walker retains bench with win over Howell

By JIM HARDIN
Staff Writer

Republican Charles Ben Howell may be a step closer to being jailed for contempt of court after suffering defeat Tuesday in his bid for judge of 162nd District Court.

Incumbent Judge Dee Brown Walker, received 56.06 per cent of the vote, said an assistant district attorney told him that proceedings would be started today for Howell to begin serving a 33-day jail term.

Walker received 220,144 votes to 172,556 for Howell.

Howell, 51, who has suffered defeat in the six times he has sought public

COUNTY/COURT

office, was sentenced to three days in jail and fined $100 by Walker after finding him in contempt of court in connection with a divorce proceeding he was handling.

And while appealing Walker's decision, Judge Louis T. Holland of Montague found Howell in contempt of court and sentenced him to 30 days in jail and fined him $500.

In addition to contempt of court action, disbarment proceedings were initiated against Howell. In those proceedings, however, Howell was the victor and was allowed to keep his law license.

Although Howell said he has one more appeal left before being incarcerated, he did not appear intimidated by Walker's comments about jail.

"I intend to be heard from again," Howell said. "I'll just leave it at that.

* * * * * * * * *

U.S. DISTRICT COURT, N.D. TEXAS, DALLAS DIV.; CHARLES BEN HOWELL v. STATE BAR OF TEXAS, JOHN M. LAWRENCE III, GRANT DAVIS, ROBIN P. HARTMAN, NO. CA-3-76-0,280-C

ORDER

[Filed March 4, 1976]

Plaintiff's Motion for Preliminary Injunction was brought before the Court on March 1, 1976. After having heard and considered the affidavits of plaintiff and the oral and written argument of counsel, this Court is of the opinion that the preliminary injunction should be denied. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1974); *Younger v. Harris*, 401 U.S. 37 (1971). Plaintiff of course has the right to raise federal constitutional issues in federal court, should that prove necessary after the state court proceeding is completed. *England v. Board of Medical Examiners*, 375 U.S. 411 (1964).

It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Preliminary Injunction be and hereby is denied.

ORDER

[Caption as immediately foregoing;
filed April 15, 1977]

Plaintiff's Second Motion For Preliminary Injunction . . . Plaintiff's Motion For Trial on the Merits Forthwith filed on April 14, 1977 has been examined by the Court. The Court is of the opinion that its order of March 4, 1976 extends to and includes all matters contained in the plaintiff's present motion. The Court is of the further opinion that there are no grounds to modify or set aside its order of March 4, 1976.

It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff's Second Motion For Preliminary Injunction . . . Plaintiff's Motion For Trial on the Merits Forthwith be and hereby is denied.

Constitutional Provisions, Statutes and Rules

The United States Constitution, Amendment Five. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The United States Constitution, Amendment Fourteen, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.